Affirmed.
Judge Heard
Dennis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~385.~~ 153

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

MYRA CLARK GAINES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 17, 1871.

Dec. 7, 1872

SUPREME COURT OF THE UNITED STATES.

No. 385.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

MYRA CLARK GAINES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 Circuit court of the United States. Fifth circuit and district of Louisiana.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

Mandate of the United States Supreme Court.—Filed May 28, 1869.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Louisiana, greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Louisiana, in a cause between Myra Clark Gaines, complainant, and The City of New Orleans, H. E. Lameyer, Charles Hopkins, Dominique Lanata, and L. Lalande Ferriere, defendants, (in
2 equity,) wherein the decree of the said circuit court, entered in said cause, is in the following words, viz:

"This cause came on to be heard at this term upon bills, answers and replications, exhibits and proofs, and was argued by counsel and submitted to the court; whereupon, on consideration thereof, it is ordered, adjudged, and decreed that the bill of complainant herein be dismissed with costs."

Decree entered 19 April, A. D. 1858.

Decree signed 23 April, A. D. 1858.

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel: On consideration whereof it is now here ordered, adjudged, and decreed by this court that the
3 decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and that the said complainant recover against the said defendants, The City of New Orleans et al., one thousand eight hundred and seventy-four dollars and fifty-six cents, for her costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the circuit court of the United States for the district of Louisiana, with instructions to enter a decree for the complainant, in conformity with the opinion of this court.

6TH APRIL.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and decree of this court, as, according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-seven.

4 Costs of complainant: Clerk, $1,854.56; attorney, 20.00—1,874.56.
Taxed by
(Signed) D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Supreme Court U. S. December term, 1867.

Costs of Myra Clark Gaines in No. 82, 1865: Ent. ac., 56; fil. wr., 40; allow., 40; cit., 40; serv., 40; bond and app., 68; ass. of er., 40; pray., 40; rec., 1.00; cert., 40; doc., 40; fee-bond and ent. sec., 1.52; ru. tr., 84. December term: Ap., 21; ru., 28; pre. & rec., 80; ord., 28; con., 14; 1866, Dec. t.: Ap., 21; ru., 28; pres. & rec's., 1.60; ord., 28; con., 14; 1867, Dec. t.: Ap., 21; ru., 28; or., 40; arg., 56; mo., 28; jud., 1.64½; fil., 40; rec. pr., 56; pre. & rec., 80; or'g'n'l pa's, 1.20; mo. and aw., 56; mand., 5.98½; fil. pa., 5.60; record, 1,823.50; co. and co., 56—$1,854.56. $1,854.56, fee-book I, pa. 232.
Test: D. W. MIDDLETON, *C. S. C. U. S.*

1869, May 18. Rec'd pay't.
(Signed) D. W. MIDDLETON, *C. S. C. U. S.*

Motion and order to record mandate of U. S. Supreme Court.

5 United States circuit court. Fifth circuit and district of Louisiana. April term, 1869.

NEW ORLEANS, *Friday, May* 28, 1869.

Court met pursuant to adjournment.
Present, Hon. N. H. Swayne, presiding judge.
Present, Hon. E. H. Durell, district judge.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

An appeal having been taken in this cause to the Supreme Court of the United States from the decree rendered by this court, on 19th April, 1858, the mandate of said court was this day filed; and, on motion of J. A. Campbell, esq., ordered to be recorded, and it is as follows, viz:

"And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel: On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby,
6 reversed, with costs, and that the said complainant recover against the said defendants, The City of New Orleans et al., one thousand eight hundred and seventy-four dollars and fifty-six cents for her costs herein expended, and have execution therefor."

And it is further ordered that this cause be, and the same is hereby, remanded to the circuit court of the United States for the district of Louisiana, with instructions to enter a decree for the complainant in conformity with the opinion of this court.

"6TH APRIL."

Motion.—Filed May 28th, 1869.

Circuit court of the United States, district of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

MYRA CLARK GAINES
vs.
LIZARDI ET AL. } No. 2734.

In these causes, respectively, the plaintiff shows that mandates
7 have come from the Supreme Court of the United States, showing that the decree heretofore rendered in each of them in this court has been reversed, with directions to the court to proceed conformably to the opinion.

The plaintiff moves that the mandates of the Supreme Court be spread upon the minutes of the court, and that the court will make such orders and directions to speed the cause that may be required by the opinion of the Supreme Court in the cause aforesaid.

(Signed) J. A. CAMPBELL,
For Mover.

Motion.—Filed May 28, 1869.

Circuit court of the United States. District of Louisiana.

GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

GAINES
vs.
LIZARDI & AL. } No. 2734.

Motion is made that the orders and directions contained in the report of the case of Gaines vs. Hennen, in 24th Howard R., 555, 615, be entered in these causes under the mandates of the Supreme Court,
8 the subject-matter of these causes being the same as in that case, and the record being the same.

(Signed) J. A. CAMPBELL,
For Pl'ff.

Order at chambers on motion.—Filed May 28, 1869.

Proceedings at chambers before the Hon. Noah H. Swayne, presiding judge, May 28, 1869.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

MYRA CLARK GAINES
vs.
LIZARDI & AL. } No. 2734.

Motion having been made by counsel for plaintiff that the orders and

directions contained in the report of the case of Gaines vs. Hennen, in 24th Howard, pp. 555–615, be entered in these causes under the mandates of the Supreme Court, the subject-matter of these causes
9 being the same as in that case, and the record being the same.

After hearing argument, his honor declined to act on the motion and directed that the same be continued for further action hereafter.

Defendants' objections to motion of May 28, 1869.—*Filed May* 29, 1869.

Circuit court of the United States, district of Louisiana.

GAINES
vs.
LIZARDI & AL.

GAINES
vs.
CITY OF NEW ORLEANS & AL.

The defendants in the above entitled cases object to the hearing of the motion now made, "that the orders and directions contained in the report of the case of Gaines vs. Hennen in 24th Howard R., 555–615 be entered in these causes under the mandates of the Supreme Court" on the following grounds:

First. The circumstances of these cases are not the same with those involved in the case referred to, so as to authorise the making of such orders and directions; and

Second. The defendants have not had sufficient time to exam-
10 ine into the matters involved in the motion and to point out the particular differences, or to state their specific objections to the motion, or to be prepared to make an argument on the questions which are presented by and necessarily grow out of the said motion.

(Signed) MILES TAYLOR &
JAMES McCONNELL,
of Counsel.

Motion and order.—Case fixed upon the opinion and mandate of the Supreme Court.

April term, 1870.

NEW ORLEANS, *Friday, May* 27, 1870.

Court met pursuant to adjournment.

Present, his honor, J. P. Bradley, associate justice of the supreme court, presiding.

Present, his honor W. B. Woods, judge of the circuit court.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

On motion of J. A. Campbell, esq., ordered that this cause be
11 set down for a final decree upon the opinion and mandate of the Supreme Court of the United States and other proceedings in the cause on Friday, 3d June next, at 11 a. m., and that the parties interested be notified thereof.

Motion and order.—Extract from the minutes of Saturday, June 4, 1870.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

On motion of J. S. Whitaker, esq, ordered that the motion herein pending be heard on Monday 6th instant, and that the parties interested be notified thereof.

Marshal's return.

NOTA.—The return of service by the marshal could not be found after diligent search and inquiry.

Hearing and continuance of motion.—Extract from the minutes of Monday, June 6, 1870.

12 MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

The motion herein pending was called up, and, after hearing argument of J. A. Campbell and J. S. Whitaker, esq'rs, the same is continued till to-morrow.

Motion by complainant.—Filed June 6, 1870.

In the circuit court of the United States, for the fifth circuit and district of Louisiana.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

And now comes Myra Clark Gaines, complainant, and on suggesting to this honorable court that, by virtue of the opinion of the Supreme Court herein given and the mandate thereon, she is entitled to all the property claimed by her and described in her bill of complaint filed herein; and suggesting further that certain of the defendants have sold or parted with the possession of all or certain portion of said lands,
13 and that she has right to make her election to take the purchase-price of said lands so sold or parted with from the said defendants, with interest and the rents and profits of said lands, or to pursue the subsequent holders of said lands for the lands themselves, and for said rents and profits, and that she has made her election to take the purchase-price of said lands so sold or parted with, with the interest and the rents and profits of said lands, and also to take such portions of said lands as now remain in the possession of said defendants unsold and undisposed of, with all the rents and profits thereof accrued and accruing, with interest thereon from the date of filing this suit; and on further suggesting that, should the court not consider this mover entitled to make her election as herein before made, that in such case, she reserves all her rights against all subsequent holders of said lands, putting herself in such case in the same position as she was before making this motion:

It is ordered by the court that she be allowed her said election to take such purchase-price and interest, and rents and profits and inter-
14 est thereon, from the date of filing this suit from the respective defendants, and that, in default of the same being paid to her by said respective defendants, all rights be reserved to her to pursue her said claims against any and all subsequent holders of said lands.

(Signed) MYRA CLARK GAINES.
(Signed) B. W. BARNES.
" D. K. GRAHAM.

Hearing and submission of motions.—Extract from the minutes of Tuesday June 7, 1870.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

MYRA CLARK GAINES
vs.
M. J. LIZARDI & AL. } No. 2734.

The motions herein pending were resumed, and, after hearing further argument by J. McConnell, J. A. Campbell, and Miles Taylor, the court took time to advise.

15 *Draft for judgment.—Filed June 9, 1870.*

MYRA CLARK GAINES.
vs.
CITY OF NEW ORLEANS, & AL. } No. 2695.

In the above cases—

I. As to the following-named defendants, to wit, Widow Ramon, Massana N. Dabon, J. J. Lamoine, Elizabeth Minturn alias Dauphine, Aloyse Minturn alias Dauphine, and Paul Pesquier, who filed pleas to the jurisdiction of the court, the decree will be that said pleas be overruled, and that the said defendants answer the bill.

II. As to the following-named defendants, only decrees will be entered: William Creppell, John Diamond, E. P. Senecal, revived against Isabella Jenkins, The City of New Orleans, and H. E. Lameyer, and F. D. de la Croix, and John Slidell.

III. The form of the decree in the Hennen case will be adopted in making the decrees in these cases, so far as it is applicable, and except as herein and hereby modified.

IV. As to the City of New Orleans, the only property to be men-
16 tioned in the decree, and for which a decree of possession is to be entered is that shown to be claimed by the city at the time of the filing of this suit, as shown by the answers of the mayor of the city to the interrogatories, to be then claimed and owned by the city, to wit, the following:

The square comprised between St. Peter, St. Hagan avenue, Orleans street and Lake road, as shown on the sketch annexed to the answer, and on which the draining machine for draining the city is located; and also four other squares comprised between Dupré Salcedo, St. Ann, and St. Peter streets.

The city to be accountable for mesne profits on the above lands, and

on lands of Daniel Clark, possessed by them, and sold before the filing of the bill for the time the same were in their possession respectively, subject to the laws of Louisiana in cases of such recovery, &c. Proof of such mesne profits to be made in the usual way, the defendant being entitled to the benefit of the mayor's answer under oath until overcome by the proper testimony.

Whether the prescription of three years before filing the bill applies to the rents and profits, notwithstanding prescription was disallowed as to the recovery of the lands themselves I do not decide, but leave that to be considered by the master to whom the matter may be referred.

(Signed) JOS. P. BRADLEY.

JUNE 10, 1870.

17 *Decree upon mandate.—Extract from judgment docket.*

United States circuit court, fifth circuit and district of Louisiana.
April term, 1870.

NEW ORLEANS, *Saturday, June* 11, 1870.

Court met pursuant to adjournment. Present, Hon. J. P. Bradley, associate justice of the Supreme Court, presiding; present, Hon. W. B. Woods, circuit judge.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

In obedience to the mandate of the Supreme Court of the United States filed in this court, reversing the decree of this court rendered in this cause, on the 19th day of April, A. D. 1858, and remanding said cause to this court, with instructions to enter a decree for complainant in conformity with the opinion of said Supreme Court—

For reasons assigned, it is now hereby ordered, adjudged, and decreed, in conformity and obedience to the said mandate of the Supreme
18 Court of the United States, upon the evidence in this cause, that Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and, as such, was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same; and that, under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such is entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree that all the property described by the defendant, The City of New Orleans, in its answer and exhibits thereto annexed, is part and parcel of the property composing the succession of the said Daniel Clark, to wit, the same which Richard Relf and Beverley Chew, under pretended authority of testamentary executors of the said Daniel Clark, and of attorneys-
19 in-fact of Mary Clark, by act of sale, dated October 30, 1821, conveyed to Evariste Blanc, and which the said Evariste Blanc, by act of sale of September 26, 1834, conveyed to the mayor, aldermen, and inhabitants of the city of New Orleans; that the said Richard Relf and Beverley Chew, at the time and times when, under the pretended au-

thority aforesaid, they caused the property, so described and claimed by the defendant, The City of New Orleans, to be set up and sold by public auction on the 21st day of December, 1820, and when they executed their act of sale aforesaid, of the 30th October, 1821, to the said Evariste Blanc, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction, and the said act of sale of the said Evariste Blanc, in confirmation thereof, were wholly unauthorized and illegal, and are utterly null and void, and that the defendant, The City of New Orleans, at the time when it purchased the property, so described as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of said Beverly Chew and Richard Relf in the
20 premises illegal, null, and void, and that it, The City of New Orleans, ought to be deemed and held, and is hereby deemed and held to have purchased the property in question, with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverley Chew, and the said act of sale to the said Evariste Blanc, were unauthorized, illegal, null, and void, and in derogation and fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree that all the said property now remains unclaimed and unindisposed of as part and parcel of the succession of the said Daniel Clark, notwithstanding such sale at auction and act of sale in the pretended authority of the said Richard Relf and Beverley Chew.

And this court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, as the legitimate and only child of the said Daniel Clark, and universal legatee, under his last will and testament, is justly and lawfully entitled to the property aforesaid,
21 together with all the yearly rents and profits accruing from the same, since the same came into the possession of the said defendant, to wit, on the 26th of September, 1834, except as hereinafter mentioned, and for which the said defendant is hereby adjudged, ordered, and decreed to account to the said Myra Clark Gaines as hereinafter mentioned.

And whereas it appears by the said answer and exhibits that the said defendant, The City of New Orleans, had sold and disposed of certain portions of said described tract before the filing of the bill in this cause, to wit, all of the same except the following parcels, which were still claimed and held by the said city at the time of filing said bill, and at this time, that is to say: All the square comprised between St. Peter street, Hagan avenue, Orleans street, and Lake road, as shown on the sketch annexed to the answer, and on which the draining machine for draining the city is located; and also four other squares comprised between Dupré, Salcedo, St. Ann, and St. Peter streets, sold at public auction as aforesaid, on the 21st day of December, 1820, under
22 the pretended authority of said Richard Relf and Beverley Chew, as testamentary executors of Daniel Clark, deceased, and as attorney-in-fact of Mary Clark to Evariste Blanc, and afterwards conveyed by said Evariste Blanc to the said defendant, The City of New Orleans, on the 26th day of September, 1834.

It is, therefore, ordered, adjudged, and decreed that the said defendant, The City of New Orleans, do forthwith surrender and deliver to the complainant, Myra Clark Gaines, all of such portion of said tract of land, to wit: The portion thereof bounded by and enclosed within Dupré, Salcedo, St. Ann, and St. Peter streets; and also the portion thereof

bounded by and enclosed within St. Peter street, Hagan avenue, Orleans street, and Lake road as aforesaid, and that the said defendant do account to the said complainant for the rents and profits of said portions of said tract of land so ordered to be surrendered and delivered by it to the said complainant.

And this court doth further order, adjudge, and decree that an account be taken by John B. Weller, a master in chancery of this
23 court, of the yearly rents and profits of the said portion of said land now held as aforesaid by the defendant, The City of New Orleans, from the time when the said land came into possession of said defendant, on the 26th day of September, 1834, and of all other portion or portions of said tract of land set forth in the said answer of defendant and exhibits thereto annexed from the 26th day of September, 1834, to the days and date when the said defendant, The City of New Orleans, sold or disposed of the same to other parties, and report the same to this court, said account to be made according to the laws of the State of Louisiana.

This court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have execution against the defendant, The City of New Orleans, for , costs, incurred in this cause in both courts.

And this court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have leave to apply for such further order, directions, and decree as may be now or hereafter necessary in the premises.

Decree rendered June 11, 1870.

Decree signed June 15, 1870.

24 (Signed) W. B. WOODS, *Judge.*

Fi. Fa.—Issued 24th August, 1870.—*Returned and filed October* 13, 1870.

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded that you demand from the city of New Orleans, one of the defendants herein, the sum of two thousand one hundred eighty-one dollars and thirty-one cents for costs of suit, as follows:

Costs in U. S. Supreme Court as per mandate	$1,854 56
Clerk's costs in U. S. circuit court	261 25
U. S. marshal's costs	45 50
Attorney's fees	20 00
	$2,181 31

And the costs for executing this writ cash, which Myra Clark Gaines lately recovered, by judgment of the circuit court of the United
25 States for the 5th circuit and district of Louisiana, & in obedience to the mandate of the Supreme Court of the United States, and if the same be not paid on demand that then you cause the same to be made out of the personal estate of the said city of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then

you cause the same to be made out of the real estate of the said city of New Orleans in your district, whereof said city was owner, on the 15th day of June, 1870, into whose hands soever the same may have come; and that you have those moneys before our said court to render to the said Myra Clark Gaines for the judgment aforesaid, on the 70th day from the date hereof, together with this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 24th day of August, A. D. 1870, and 95th year of the independence of the United States.

26 [SEAL.] (Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Clk.*

Marshal's return thereon.

Received, August 24, 1870, by the U. S. marshal, and having demanded payment from the city of New Orleans (copy of said notice hereto annexed and made part hereof,) on the 25th day of August, 1870, and the city of New Orleans failing to comply with said demand, I did seize, on the first day of September, 1870, a certain property known as the iron building and the ground on which the said iron building is situated, with all the rights, titles, and privileges thereunto belonging, and situate at the head of Canal street, subject to present lease, of which seizure I gave notice to the city of New Orleans, on the 1st day of September, 1870, copy of said notice of seizure is hereto annexed, and made part hereof; and also had said seizure recorded at the office of the recorder of mortgages in the city of New Orleans, and parish of Orleans; and also did, on the 6th day of October, 1870, serve notice on
27 plaintiff and defendant to appoint appraisers, copies of which are hereto annexed and made parts of this return.

I did receive, on the 13th day of October, 1870, from the city of New Orleans, the sum of twenty-two hundred fifty-eight $\frac{21}{100}$ dollars, and therefore return this fi. fa satisfied.

New Orleans, October 13, 1870.

(Signed) GUS. HOLLANDER,
D'y U. S. Marshal.

Notice of demand referred to in the foregoing return on fi. fa.

NEW ORLEANS, *August* 25, 1870.

In the United States circuit court for the fifth circuit and district of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF LOUISIANA.

To the city of New Orleans:

Take notice that, by virtue of a writ of fieri facias issued, and to me directed by the honorable the circuit court of the United States for the fifth circuit and district of Louisiana, in the above-entitled
28 suit I hereby notify you to pay into my hands within three days from the service of this notice, the amount of judgment, interest,

and costs, as set forth in said writ, to wit, the sum of $2,223.21 with interest, and all costs, or to point out property sufficient to satisfy the same, in default of which I shall proceed to seize and advertise, for sale according to law, any of your property, real or personal, sufficient to satisfy said writ.

(Signed) GUS. HOLLANDER,
Deputy U. S. Marshal, District of Louisiana.

**Marshal's return thereon.*

Reference approved.
F. A. WOOLFLEY, *Clerk.*

On the 25th day of August, 1870, served copy of the within notice of demand on the City of New Orleans, through B. F. Flanders, mayor, by delivering the same to him in person.

N. O., Aug. 25, 1870.

(Signed) G. HOLLANDER,
*D'y Mar'l.**

Three days' notice of seizure referred to in foregoing return on fi. fa.

In the United States circuit court for the district of Louisiana.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS & AL. } No. 2695.

NEW ORLEANS, *September 1st*, 1870.
UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF LOUISIANA.

To the City of New Orleans:

Take notice that I have seized and in three days from the service
29 hereof shall proceed to advertise and sell, according to law, the following described property, viz:

The iron building and the ground, on which the said iron building is located, with all the rights, titles, and privileges thereunto belonging, and situate at the head of Canal street subject to present lease, to pay and satisfy the writ issued in the above-entitled case, say the sum of $2,223.21, with interest and costs, unless the same is immediately paid.

(Signed) GUS. HOLLANDER,
Deputy U. S. Marshal.

Marshal's return thereon.

On the 1st day of September served a copy of the within notice of seizure, on the City of New Orleans, through B. F. Flanders, mayor, by delivering the same to said mayor in person.

New Orleans, Sept. 1, 1870.

(Signed) GUS. HOLLANDER,
D'y U. S. Marshal.

Notice to plaintiff to appoint an appraiser.—Referred to in the foregoing writ of fi. fa.

United States circuit court.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS & ALS. } No. 2695.

To Myra Clark Gaines, plaintiff in the above suit:

Take notice that you are required to appoint an appraiser to act in your behalf to appraise the property seized in the above-entitled suit, and which property will be sold in due time to satisfy the judgment rendered herein, and you will have your appraiser at my office, custom-house building, at 10 o'clock a. m., on Thursday, the 13th day of October, 1870, in order to qualify for his said duties; failing in which the United States marshal will appoint one to act in your behalf.

United States marshal's office, New Orleans, Oct. 5, 1870.

(Signed) F. A. WOOLFLEY,
Deputy U. S. Marshal District of Louisiana.

Marshal's return thereon.

On the 6th day of October, 1870, served a copy of the within
31 notice on Myra Clark Gaines, by leaving the same at her domicil, No. 234 Canal st., in the hands of Mrs. McConnell, Mrs. Gaines being absent at the time of service.

New Orleans, October 6, 1870.

(Signed) S W. REED,
D'y U. S. Marshal.

Notice to defendant to appoint an appraiser.—Referred to in the foregoing writ of fi. fa.

United States circuit court.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS & AL. } No. 2695.

To the city of New Orleans, defendant in the above suit:

Take notice that you are required to appoint an appraiser, to act in your behalf, to appraise the property seized in the above-entitled suit, and which property will be sold in due time to satisfy the judgment rendered herein, and you will have your appraiser at my office, custom-house building, at 10 o'clock a. m., on Thursday, the 13th day of
32 October, 1870, in order to qualify for his said duties; failing in which the United States marshal will appoint one to act in your behalf.

United States Marshal's Office, New Orleans, October 5, 1870.

(Signed) F. A. WOOLFLEY,
Deputy U. S. Marshal District of Louisiana.

Marshal's return thereon.

On the 6th day of October, 1870, served copy of within on the City of New Orleans, through B. F. Flanders, mayor, by delivering the same to him in person.

New Orleans, October 6, 1870.

(Signed) S. W. REED,
D'y U. S. Marshal.

Report of master in chancery on rents and profits.—Filed March 14, 1871.

Circuit court of the United States, fifth circuit and district of Louisiana.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 2695.

To the honorable the judge of the circuit court of the United States for the fifth circuit and district of Louisiana:

33 The undersigned master in chancery, to whom was referred for report the above case of Gaines vs. City of New Orleans by an order of this honorable court of the eleventh day of June, 1870, having examined the testimony on file, and from information obtained from the offices of the register of conveyances and assessors of the city of New Orleans, and from information derived from witnesses cognizant of the facts connected therewith, has the honor to report as follows, viz:

That, under the order of this court above referred to, he was required to take an account of the yearly rents and profits accrued and accruing from the property in said order described since the 26th of September, 1834, the date of the purchase of said property by the defendants; a portion of which property is one square of ground of irregular form, being bounded by St. Peter, Hagan avenue, Orleans, and Lake Road streets, together with the buildings and improvements thereon.

34 This portion of land was acquired by the defendants by purchase from Evariste Blanc, on the 26th day of September, 1834, as per act before Felix de Armas, notary public. The improvements on this property consist of a drainage house and out-buildings, and is known as the Orleans draining machine, and has been in continuous possession of the city from date of purchase.

The city has occupied and used for public purposes this property of Mrs. Gaines, obtained in bad faith, for more than 35 years, and equity demands that she should be allowed a fair and just compensation therefor. As the city received no rents whatever, and no profits, except by the increase of its revenue, it is difficult to fix the amount to which she is justly entitled. The master presents facts and figures, which, he trusts, will enable the court to arrive at an equitable conclusion.

A number of witnesses have been examined, who have long been residents of the city, to ascertain the rental value of this property. It will be seen, from the depositions herewith filed, their estimates are as follows:

35	L. H. Pilie	$6,000 00
	J. Community	6,000 00
	W. J. McCulloh	8,000 00
	L. Caldwell	9,000 00
	W. H. Wilder	10,000 00
	A. Barnett	9,000 00

Making an average of $8,000 per year.

If this basis were adopted, the following will be the result:

Value of rental of the Orleans Drainage Machine, compnted at the rate of $8,000.00 per year.

From 1 July, 1835, to 1 July, 1836		$8,000 00
" 1 do. 1836, " 1 do. 1837		8,000 00
" 1 do. 1837, " 1 do. 1838		8,000 00
" 1 do. 1838, " 1 do. 1839		8,000 00
" 1 do. 1839, " 1 do. 1840		8,000 00
" 1 do. 1840, " 1 do. 1841		8,000 00
" 1 do. 1841, " 1 do. 1842		8,000 00
" 1 do. 1842, " 1 do. 1843		8,000 00
" 1 do. 1843, " 1 do. 1844		8,000 00
" 1 do. 1844, " 1 do. 1845		8,000 00
" 1 do. 1845, " 1 do. 1846		8,000 00
" 1 do. 1846, " 1 do. 1847		8,000 00
" 1 do. 1847, " 1 do. 1848		8,000 00
" 1 do. 1848, " 1 do. 1849		8,000 00
" 1 do. 1849, " 1 do. 1850		8,000 00
" 1 do. 1850, " 1 do. 1851		8,000 00
" 1 do. 1851, " 1 do. 1852		8,000 00
" 1 do. 1852, " 1 do. 1853		8,000 00
" 1 do. 1853, " 1 do. 1854		8,000 00
36 From 1 July, 1854, to 1 do. 1855		8,000 00
" 1 do. 1855, " 1 do. 1856		8,000 00
" 1 do. 1856, " 1 do. 1857		8,000 00
" 1 do. 1857, " 1 do. 1858		8,000 00
" 1 do. 1858, " 1 do. 1859		8,000 00
" 1 do. 1859, " 1 do. 1860		8,000 00
" 1 do. 1860, " 1 do. 1861		8,000 00
" 1 do. 1861, " 1 do. 1862		8,000 00
" 1 do. 1862, " 1 do. 1863		8,000 00
" 1 do. 1863, " 1 do. 1864		8,000 00
" 1 do. 1864, " 1 do. 1865		8,000 00
" 1 do. 1865, " 1 do. 1866		8,000 00
" 1 do. 1866, " 1 do. 1867		8,000 00
" 1 do. 1867, " 1 do. 1868		8,000 00
" 1 do. 1868, " 1 do. 1869		8,000 00
" 1 do. 1869, " 1 do. 1870		8,000 00
" 1 do. 1870, " 1 March, 1871		5,333 33
Total value of rents		$285,333 33

Interest on rents at the rate of 5% per annum.

	Amount.	When due.	Time.	Interest.
	$8,000 00	1 July, 1836	34⅔ years	13,866 66
	8,000 00	1 do. 1837	33⅔ do.	13,466 66
	8,000 00	1 do. 1838	32⅔ do.	13,066 66
	8,000 00	1 do. 1839	31⅔ do.	12,666 66
	8,000 00	1 do. 1840	30⅔ do.	12,266 66
	8,000 00	1 do. 1841	29⅔ do.	11,866 66
	8,000 00	1 do. 1842	28⅔ do.	11,466 66
	8,000 00	1 do. 1843	27⅔ do.	11,066 66
	8,000 00	1 do. 1844	26⅔ do.	10,666 66
37	8,000 00	1 do. 1845	25⅔ do.	10,266 66
	8,000 00	1 do. 1846	24⅔ do.	9,866 66
	8,000 00	1 do. 1847	23⅔ do.	9,466 66
	8,000 00	1 do. 1848	22⅔ do.	9,066 66
	8,000 00	1 do. 1849	21⅔ do.	8,666 66
	8,000 00	1 do. 1850	20⅔ do.	8,266 66
	8,000 00	1 do. 1851	19⅔ do.	7,866 66
	8,000 00	1 do. 1852	18⅔ do.	7,466 66
	8,000 00	1 do. 1853	17⅔ do.	7,066 66
	8,000 00	1 do. 1854	16⅔ do.	6,666 66
	8,000 00	1 do. 1855	15⅔ do.	6,266 66
	8,000 00	1 do. 1856	14⅔ do.	5,866 66
	8,000 00	1 do. 1857	13⅔ do.	5,466 66
	8,000 00	1 do. 1858	12⅔ do.	5,066 66
	8,000 00	1 do. 1859	11⅔ do.	4,666 66
	8,000 00	1 do. 1860	10⅔ do.	4,266 66
	8,000 00	1 do. 1861	9⅔ do.	3,866 66
	8,000 00	1 do. 1862	8⅔ do.	3,466 66
	8,000 00	1 do. 1863	7⅔ do.	3,066 66
	8,000 00	1 do. 1864	6⅔ do.	2,666 66
	8,000 00	1 do. 1865	5⅔ do.	2,266 66
	8,000 00	1 do. 1866	4⅔ do.	1,866 66
	8,000 00	1 do. 1867	3⅔ do.	1,466 66
	8,000 00	1 do. 1868	2⅔ do.	1,066 66
	8,000 00	1 do. 1869	1⅔ do.	666 66
	8,000 00	1 do. 1870	⅔ do.	246 66
	Total interest on rents			247,266 44

38 EXPENDITURES.

City tax.—By reference to the assessment rolls of the city, he finds that this property was placed on said rolls as free. Hence no city tax was paid.

State tax.—Being considered city property, it was, therefore, exempt from taxation by the State.

Repairs.—From the evidence of Mr. L. H. Pilie, late city surveyor, it will be seen that it has cost the city five hundred dollars per year to keep the buildings in repair, and from the 1st July, 1836, to 1st March, 1871, being 34⅔ years, at $500 per year, $17,333.33.

Interest.—On the above yearly cost of keeping the buildings in repair, $500 per year, interest, at the rate of 5 % per annum on each yearly payment for 34⅔ years, amounts to $15,446.47.

39 Recapitulation on the basis of annual rent of $8,000 will be—

Value of rents (see pages 4 & 5)		$285,333 33
Interest on same (see pages 6 & 7)		247,266 44
		532,599 77
Less expense for repairs (see page 9)	$17,333 33	
interest (see page 9)	$15,446 47	
		32,779 80
Netting		$499,819 97

Statement of the value of rents and profits of the Orleans draining-machine to the city of New Orleans on the basis of taxation on property which, previous to the building of the machine, yielded no revenue to the city.

It is difficult to estimate with accuracy the pecuniary advan-
40 tages which have resulted to the city from the possession of this property, as it has never been used for any other purpose than to drain that portion of the city which was subject to inundation. This, from the evidence submitted, appears to comprise one hundred blocks or squares. Previous to the erection of this draining-machine it yielded no revenue to the city. The assessment rolls for a series of years, extending from 1838 to 1870, have been examined, and the average rate of assessment was found to be $500,000, and the average rate of taxation one and three-fourths per cent.

If this basis be adopted, it will be found that the city has received the following revenue from the property:

Revenue received by the city, on the basis of taxation, on property drained by this machine, say $300,000.00, at 1¾ %, would give an annual increase of eighty-seven hundred and fifty dollars, ($8,750.00,) which, for 35 years, will amount to $306,250.00

41 Interest on taxes collected at the rate of 5 % per annum.

Amount.	When due.	Time.	Interest.
$8,750 00	1 March, 1836	35 years	15,312 50
8,750 00	1 do. 1837	34 do	14,875 00
8,750 00	1 do. 1838	33 do	14,437 50
8,750 00	1 do. 1839	32 do	14,000 00
8,750 00	1 do. 1840	31 do	13,562 50
8,750 00	1 do. 1841	30 do	13,125 00
8,750 00	1 do. 1842	29 do	12,687 50
8,750 00	1 do. 1843	28 do	12,250 00
8,750 00	1 do. 1844	27 do	11,812 50
8,750 00	1 do. 1845	26 do	11,375 00
8,750 00	1 do. 1846	25 do	10,937 50
8,750 00	1 do. 1847	24 do	10,500 00
8,750 00	1 do. 1848	23 do	10,062 50
8,750 00	1 do. 1849	22 do	9,625 00
8,750 00	1 do. 1850	21 do	9,187 50
8,750 00	1 do. 1851	20 do	8,750 00
8,750 00	1 do. 1852	19 do	8,312 50
8,750 00	1 do. 1853	18 do	7,875 00
8,750 00	1 do. 1854	17 do	7,437 50
8,750 00	1 do. 1855	16 do	7,000 00
8,750 00	1 do. 1856	15 do	6,562 50
8,756 00	1 do. 1857	14 do	6,125 00
8,750 00	1 do. 1858	13 do	5,687 50
8,750 00	1 do. 1859	12 do	5,250 00
8,750 00	1 do. 1860	11 do	4,812 50
8,750 00	1 do. 1861	10 do	4,375 00
8,750 00	1 do. 1862	9 do	3,937 50
8,750 00	1 do. 1863	8 do	3,500 00
42 8,750 00	1 do. 1864	7 do	3,062 50
8,750 00	1 do. 1865	6 do	2,625 00
8,750 00	1 do. 1866	5 do	2,187 50
8,750 00	1 do. 1867	4 do	1,750 00
8,750 00	1 do. 1868	3 do	1,312 50
8,750 00	1 do. 1869	2 do	875 00
8,750 00	1 do. 1870	1 do	437 50
Total interest on taxes			$275,625 00

Expenditures incurred in building and running the draining-machine, collecting the taxes, constructing the canals, laying off the squares, ditching, &c., and keeping the same in order.

From the evidence of Mr. W. H. Bell, city surveyor, and from statements taken from the books of his office, it appears that the city expended for the building and running of this draining-machine to the 1st March, 1870....	$151,832 00
Expense for collecting $306,250.00 taxes, at 2 %.....	6,125 00
Expense for constructing canals and ditches and laying off squares, &c.....	21,193 "
Expense keeping canals and ditches in repair.....	17,500 "
Total expenditures.....	$196,650 00

43 Which, for 35 years, would give an average expense of $5,600.00 per year, on which interest is calculated.

Interest on annual expenditures, as arranged on previous page, at $5,600.00, at the rate of 5 % p'r annum.

Amount.	When due.	Time.	Interest.
5,600 00.....	1st March, 1836....	35 years....	9,800 00
5,600 00.....	1 do. 1837....	34 do.....	9,520 00
5,600 00.....	1 do. 1838....	33 do.....	9,240 00
5,600 00.....	1 do. 1839....	32 do.....	8,960 00
5,600 00.....	1 do. 1840....	31 do.....	8,680 00
5,600 00.....	1 do. 1841....	30 do.....	8,400 00
5,600 00.....	1 do. 1842....	29 do.....	8,120 00
5,600 00.....	1 do. 1843....	28 do.....	7,840 00
5,600 00.....	1 do. 1844....	27 do.....	7,560 00
5,600 00.....	1 do. 1845....	26 do.....	7,280 00
5,600 00.....	1 do. 1846....	25 do.....	7,000 00
5,600 00.....	1 do. 1847....	24 do.....	6,720 00
5,600 00.....	1 do. 1848....	23 do.....	6,440 00
5,600 00.....	1 do. 1849....	22 do.....	6,160 00
5,600 00.....	1 do. 1850....	21 do.....	5,880 00
5,600 00.....	1 do. 1851....	20 do.....	5,600 00
5,600 00.....	1 do. 1852....	19 do.....	5,320 00
5,600 00.....	1 do. 1853....	18 do.....	5,040 00
5,600 00.....	1 do. 1854....	17 do.....	4,760 00
5,600 00.....	1 do. 1855....	16 do.....	4,480 00
5,600 00.....	1 do. 1856....	15 do.....	4,200 00
5,600 00.....	1 do. 1857....	14 do.....	3,920 00
5,600 00.....	1 do. 1858....	13 do.....	3,640 00
5,600 00.....	1 do. 1859....	12 do.....	3,360 00
44 5,600 00.....	1 do. 1860....	11 do.....	3,080 00
5,600 00.....	1 do. 1861....	10 do.....	2,800 00
5,600 00.....	1 do. 1862....	9 do.....	2,520 00
5,600 00.....	1 do. 1863....	8 do.....	2,240 00
5,600 00.....	1 do. 1864....	7 do.....	1,960 00
5,600 00.....	1 do. 1865....	6 do.....	1,680 00
5,600 00.....	1 do. 1866....	5 do.....	1,400 00
5,600 00.....	1 do. 1867....	4 do.....	1,120 00
5,600 00.....	1 do. 1868....	3 do.....	840 00
5,600 00.....	1 do. 1869....	2 do.....	560 00
5,600 00.....	1 do. 1870....	1 do.....	280 00
Total interest.....	.....	.....	176,400 00

Recapitulation on the basis of taxation on property drained by this machine.

Amount of taxes levied (see page 12)		306,250 00
Interest on same (see pages 12 & 13)		275,625 00
		581,875 00
Less expenditures (see page 14)	196,650 00	
interest on same (see pages 15 & 16)	176,400 00	
		373,050 00
Netting		$208,825 00

45 Statement of the value of rents and profits of the buildings and land, without the machinery, on the basis of a rent of $2,400.00 per year.

It appears from the testimony of Mr. John Community, who has had charge of this draining-machine for many years, that the first machine was built on this property in 1835, and completed about the 1st July, of that year.

It also appears from the testimony of L. H. Pilie, late city surveyor, that the present building was constructed, in 1845, at a cost to the city of $18,000.00 for buildings alone, which, with the use of the land, would be worth $20,000.00, and he estimates that $2,400.00, per year would be a fair rent for the buildings and land without the drainage machinery.

If this basis be taken, the following will be the result:

46 Value of rental of the Orleans drainage building, computed at the rate of $2,400 p'r annum.

From	1st	July,	1835,	to 1st July,	1836	$2,400 00
"	1	do.,	1836,	" 1 do.,	1837	2,400 00
"	1	do.,	1837,	" 1 do.,	1838	2,400 00
"	1	do.,	1838,	" 1 do.,	1839	2,400 00
"	1	do.,	1839,	" 1 do.,	1840	2,400 00
"	1	do.,	1840,	" 1 do.,	1841	2,400 00
"	1	do..	1841,	" 1 do.,	1842	2,400 00
"	1	do..	1842,	" 1 do.,	1843	2,400 00
"	1	do.,	1843,	" 1 do.,	1844	2,400 00
"	1	do.,	1844,	" 1 do.,	1845	2,400 00
"	1	do.,	1845,	" 1 do..	1846	2,400 00
"	1	do.,	1846,	" 1 do.,	1847	2,400 00
"	1	do.,	1847,	" 1 do.,	1848	2,400 00
"	1	do.,	1848,	" 1 do.,	1849	2,400 00
"	1	do.,	1849,	" 1 do.,	1850	2,400 00
"	1	do.,	1850,	" 1 do.,	1851	2,400 00
"	1	do.,	1851,	" 1 do.,	1852	2,400 00
"	1	do.,	1852,	" 1 do.,	1853	2,400 00
"	1	do.,	1853,	" 1 do.,	1854	2,400 00
"	1	do.,	1854,	" 1 do.,	1855	2,400 00
"	1	do.,	1855,	" 1 do.,	1856	2,400 00
"	1	do.,	1856,	" 1 do..	1857	2,400 00
"	1	do.,	1857,	" 1 do.,	1858	2,400 00
"	1	do.,	1858,	" 1 do.,	1859	2,400 00
"	1	do.,	1859,	" 1 do.,	1860	2,400 00

"	1	do.,	1860, " 1	do.,	1861	2,400 00
"	1	do.,	1861, " 1	do.,	1862	2,400 00
"	1	do.,	1862, " 1	do.,	1863	2,400 00
"	1	do.,	1863, " 1	do.,	1864	2.400 00
"	1	do.,	1864, " 1	do.,	1865	2.400 00
"	1	do.,	1865, " 1	do.,	1866	2,400 00
"	1	do.,	1866, " 1	do.,	1867	2,400 00
"	1	do.,	1867, " 1	do.,	1868	2,400 00
47						
"	1	do.,	1868, " 1	do.,	1869	2,400 00
"	1	do.,	1869, " 1	do.,	1870	2,400 00
"	1	do.,	1870, " 1	Nov'r,	1870	800 00
					Total value of rents	$84,800 00

Interest on rents at the rate of 5 % per annum.

Amount.	When due.	Time.	Interest.
$2,400 00	1st July 1836	34½ years	4,120 00
2,400 00	1 do. 1837	33½ "	4,000 00
2,400 00	1 do. 1838	32½ "	3,880 00
2,400 00	1 do. 1839	31½ "	3,760 00
2,400 00	1 do. 1840	30½ "	3,640 00
2,400 00	1 do. 1841	29½ "	3,520 00
2,400 00	1 do. 1842	28½ "	3,400 00
2,400 00	1 do. 1843	27½ "	3,280 00
2,400 00	1 do. 1844	26½ "	3,160 00
2,400 00	1 do. 1845	25½ "	3,040 00
2,400 00	1 do. 1846	24½ "	2,920 00
2,400 00	1 do. 1847	23½ "	2,800 00
2,400 00	1 do. 1848	22½ "	2,680 00
2,400 00	1 do. 1849	21½ "	2,560 00
2,400 00	1 do. 1850	20½ "	2,440 00
2,400 00	1 do. 1851	19½ "	2,320 00
2,400 00	1 do. 1852	18½ "	2,200 00
2,400 00	1 do. 1853	17½ "	2,080 00
2,400 00	1 do. 1854	16½ "	1,960 00
2,400 00	1 do. 1855	15½ "	1,840 00
48 2,400 00	1 do. 1856	14½ do.	1,720 00
2,400 00	1 do. 1857	13½ do.	1,600 00
2,400 00	1 do. 1858	12½ do.	1,480 00
2,400 00	1 do. 1859	11½ do.	1,360 00
2,400 00	1 do. 1860	10½ do.	1,240 00
2,400 00	1 do. 1861	9½ do.	1,120 00
2,400 00	1 do. 1862	8½ do.	1,000 00
2,400 00	1 do. 1863	7½ do.	880 00
2,400 00	1 do. 1864	6½ do.	760 00
2,400 00	1 do. 1865	5½ do.	640 00
2,400 00	1 do. 1866	4½ do.	520 00
2,400 00	1 do. 1867	3½ do.	400 00
2,400 00	1 do. 1868	2½ do.	280 00
2,400 00	1 do. 1869	1½ do.	160 00
2,400 00	1 do. 1870	½ do.	40 00
Total interest on rents			$72,800 00

EXPENDITURE.

City tax.—By reference to the assessment rolls of the city, he finds that this property was placed on said rolls as free; hence no city tax was paid.

State tax.—Being considered city property, it was therefore exempt from taxation by the State.

49 *Repairs.*—From information derived from both Mr. L. H. Pilie, late city surveyor, and Mr. John Community, he estimates the yearly cost of keeping the buildings in repair at five hundred dollars,

($500.00.) And from the 1st July, 1836, to the 1st November, 1870, being 34⅓ years at $500 per year would amount to $17,166.66.

New building.—It will be seen from information derived from Mr. L. H. Pilie, (see page 3,) that an entire new building was erected on this square by the city, in the year 1846, at an expense or cost of eighteen thousand dollars ($18,000.

Interest on cost of repairs at the rate of 5 % per annum.

Amount.	When due.	Time.	Interest.
500 00	1st July, 1836	34½ years	858 33
500 00	1 do. 1837	33½ "	833 33
500 00	1 do. 1838	32½ "	808 33
500 00	1 do. 1839	31½ "	783 33
500 00	1 do. 1840	30½ "	758 33
500 00	1 do. 1841	29½ "	733 33
500 00	1 do. 1842	28½ "	708 33
500 00	1 do. 1843	27½ "	683 33
500 00	1 do. 1844	26½ "	658 33
50 500 00	1 do. 1845	25½ do.	633 33
500 00	1 do. 1846	24½ do.	608 33
500 00	1 do. 1847	23½ do.	583 33
500 00	1 do. 1848	22½ do.	558 33
500 00	1 do. 1849	21½ do.	533 33
500 00	1 do. 1850	20½ do.	508 33
500 00	1 do. 1851	19½ do.	483 33
500 00	1 do. 1852	18½ do.	458 33
500 00	1 do. 1853	17½ do.	433 33
500 00	1 do. 1854	16½ do.	408 33
500 00	1 do. 1855	15½ do.	383 33
500 00	1 do. 1856	14½ do.	358 33
500 00	1 do. 1857	13½ do.	333 33
500 00	1 do. 1858	12½ do.	308 33
500 00	1 do. 1859	11½ do.	283 33
500 00	1 do. 1860	10½ do.	258 33
500 00	1 do. 1861	9½ do.	233 33
500 00	1 do. 1862	8½ do.	208 33
600 00	1 do. 1863	7½ do.	183 33
500 00	1 do. 1864	6½ do.	158 33
500 00	1 do. 1865	5½ do.	133 33
500 00	1 do. 1866	4½ do.	108 33
500 00	1 do. 1867	3½ do.	83 33
500 00	1 do. 1868	2½ do.	58 33
500 00	1 do. 1869	1½ do.	33 33
500 00	1 do. 1870	½ do.	8 33
Total interest on cost of repairs			$15,166 55

51 Recapitulation:

RECEIPTS.

Value of rents, (see pages 19 and 20)	84,800 00
Interest on above, (see pages 21 and 22)	72,800 00
	157,600 00

EXPENDITURES.

Expense for repairs, (see page)	17,166 66	
Interest on cost of repairs, (see pages 25 & 26)	15,166 55	
		32,333 31
Netting		125,266 79

As to the other four (4) blocks embraced in the order of reference it does not appear that the city has derived any revenue from them, nor

have any improvements been placed thereon; nor can I find any evidence that the city has derived any revenue from the balance of the property previous to its sale by the city.

It is alledged, but no evidence introduced, that valuable cypress
52 trees were removed from these blocks during the time they were in possession of the city.

As to the question of prescription upon which I am called on to report, as the Supreme Court of the United States has decided that the city purchased in bad faith, and that the plea of prescription could not be entertained to defeat complainant's recovery of the land, so the master has come to the conclusion that it cannot be pleaded against her demand for the rents and profits.

All of which is respectfully submitted to the honorable court.

New Orleans, 13th March, 1871.

(Signed) JNO. B. MILLER.
Master in Chancery.

No. 2695.—*Evidence in the case of Myra Clark Gaines vs. City of New Orleans.—Filed with master's report, March* 14, 1871.

NEW ORLEANS, *7th February*, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

Report of master in chancery on rents and profits of building known as the Orleans draining machine.

Present, Mrs. Gaines, in person, and Mr. McConnell, representing the city of New Orleans.

Mr. L. PILIE, being sworn, says: Knows the property on which the draining is located. First buildings made in 1840 or 1841. Knows nothing about their cost. Was city surveyor 1852 to 1862. Annual cost for keeping buildings in repair 1,800 to $2,000. I consider that the property is worth a rent of from $5 to 6,000 per year. It was taken possession by the city in 1844.

By Mr. McConnell:

You say that the draining company had possession from 1841 to 1844?
I believe so.
Did the draining co. pay the city any rent?
No, sir.

The building, &c., I cannot tell the value of. I base my calcu-
54 lation as to the rent on the value of the property, draining-machine, &c., which I value at $50,000 or $60,000; building machine, buildings, machinery, and grounds; and place the rent at 10 % on that value.

Q. Suppose Mrs. Gaines was to take possession of this property and the buildings were removed, what effect would it have on that part of the city?

Ans. The whole rear portion of the city would be overflowed, as it would stop the drainage. On an adjoining square belonging to the city the city could erect a draining machine that would answer the same purpose, but if it were placed on an adjoining square——

(Objected to.)

I think it would still be on a portion of Mrs. Gaines' property, as I am informed——

How long would it take to construct a new draining-machine?

Ans. If due diligence was used, in 6 months,

Real estate valued	2,000
Buildings outside	5,000
2 draining-machines and the buildings, &c	45,000

55 This estimate is made from observation. 4 years ago it was built and paid for by the city.

(Signed) LOUIS H. PILIE.

Sworn to and subscribed this 7th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

Mr. JNO. COMMUNY sworn:

I know the drainage machines. The draining machine was built in 1836. First it was one engine of 25 horse-power. In 1846 the city put up additional improvements. I built the new machine in that year and had the contract to run it for 10 years. The improvements in 1846 cost $32,000 00. I consider it worth a rent of $6,000 per year. Should the buildings be removed, that section of the city would be overflowed. It did cost the city $5,700 per year to run the machine. I had the contract at that price, say $5,700 per year, during the 10 years in which I had the contract, and when the contract expired the city wanted me to keep it at the same price, because it would cost the city more
56 if it was run by the city. The draining-machine was for the benefit of the public; the city received no profit from it; all the lands in that section were greatly benefitted by the draining.

(Signed) JN. COMMUNY.

Sworn to and subscribed this 7th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

W. J. MCCULLOH sworn:

I was at the draining-machine this morning. I consider that $8,000 per year would be a fair rent. I do not know the valuation of the property, but judge from the benefits given to that part of the city. I am a civil engineer. I know Mr. Pilie; do not know what it would cost a month to run the machine; does not know the cost of fuel, wages, or other expenses, and not being a machinist, have no knowledge of such costs. A practical engineer only could state what the cost would be. Only one of the draining-machines is in working order, the other being out of condition completely.

57 (Signed) W'M J. MCCULLOH.

Sworn to and subscribed this 7th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

LAFAYETTE CALDWELL sworn:

Am a civil engineer. Know the draining-machine on Mrs. Gaines' property for the last 20 years. I consider the property to be worth a rent of $8,000 or $10,000 per year. I know the boundaries of Mrs.

Gaine' claim. It would cost from $1,500 to $1,800 per year to keep the machine in running order.

Quest. You say that this machine is worth a rental of $8 to $10,000 per annum; how do you arrive at that estimate?

Ans. By the amount and value of the territory drained.

Quest. How much per annum would you pay the city for a contract and you pay all the expenses, and take the machine in its present condition and run it?

Ans'r. I will pay the city $8,000 p'r annum for the privilege, and pay all the expenses.

Quest. Where and how would you expect to get your pay for
58 running the machine?

Ans. By being allowed to levy a tax on the property benefitted by the drainage.

(Signed) LAFAYETTE CALDWELL.

Sworn to and subscribed before me this 7th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

W. H. WILDER sworn:

Am a civil engineer. I have known this draining-machine since 1843. I consider the draining-machine worth a rent of $8,000 to $10,000 per year. It would cost $1,800 to $2,000 to run the machine a year. The draining-machine is located in the square bounded by Hagan avenue, Bayou St. John or Port street, St. Peter and Orleans streets. There is nothing to prevent the building of a draining-machine on the opposite side of Orleans street where it touches Bayou St. John.

Quest. How would you make this property worth a rent of $8,000 or $10,000 per annum?

Ans. By levying a tax.

Quest. How can you fix the rent per year at $8 or $10,000 if
59 you do not know the income?

Ans. I assume it on the value of the property in that drainage district; by that drainage district, I mean what is bounded by Canal Carondelet, St. Bernard avenue, Claiborne street, and Bayou St. John. At a rough estimate it comprises between 4 and 500 acres, superficial.

(Signed) W'M H. WILDER.

Sworn to this 7th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

No further witnesses appearing, the case was continued till to-morrow 8th inst., at 10 o'clock, p. m.

NEW ORLEANS, *8th February*, 1871.

In pursuance of adjournment the examination of witnesses was resumed:

Present, Mrs. Gaines in person, and Mr. McConnell, representing the city of New Orleans.

OSCAR BARON BOISFONTAINE sworn:

Occupation, collector. Is one of the agents of Mrs. Gaines. Have known the city draining-machine 10 or 12 years. I would consider

60 $2,000 to $2,500 per month a fair rent for the property, because if the drainage-machine would be closed it would cost the city ten times the value of the rent for damages resulting from the overflow of that portion of the city. To the best of my knowledge the improvements on this property cost over $200,000, including canal and ditches.

Quest. What do these improvements on the property consist of?

Ans. Building and machinery used as a draining-machine, that is all.

Quest. How would you expect to reimburse yourself if you paid $2,500 per month for the use of the machine.

Ans. I think we would be well paid. I understand the city ought to pay, as it gets $20,000 from the tax-payers to pump the water into the canal or bayou. I so believe, but cannot swear positive that the city gets $20,000.

Quest. Would you not expect to get paid if you took a contract, by taxing the property in that drainage district?

Ans. Yes. I think I would.

(Signed) OSCAR BARON BOISFONTAINE.

61 Sworn to and subscribed this 8th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

JOHN W. HARRISON sworn:

Am acquainted with the draining-machine for the past 4 years. Am a custom-house officer. There is a brick building and machinery necessary for drainage; canals run through it. I would consider $25,000 per annum a fair rent for the buildings, machinery, and canal for the district which it drains. I suppose the building itself cost $20,000; machinery, I should judge, when new, worth $60,000 or $70,000. I have lived here since 1862. I saw the machinery 3 months ago, and I considered it in a good state of repair; it is impossible to tell what second-hand machinery is worth.

I consider the buildings and machinery to-day worth not over $75,000. I consider them worth that. And further deponent sayeh not.

(Signed) J. W. HARRISON.

Sworn to & subscribed this 8th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

62 A. BARNETT sworn:

I am a notary public. I am acquainted with the draining-machine for a good many years past. I would consider the value of the building & machinery $70,000 to 80,000, and the annual rent from $8,000 to 10,000.

Quest. How would you expect to make $8 to 10,000 per year out of this property?

Ans. By the mere fact of levying a tax on the people.

Quest. Could you not make $100,000 if there was no limit to the power of taxation?

Ans. Taxation is limited, and you cannot tax the people more than they should be.

Quest. Don't you know that this is a public machine, and for the benefit of draining that portion of the city subject to overflow?

Ans. Yes.
And further deponent sayeth not.
(Signed) A. BARNETT.

Sworn to and subscribed this 8th February, 1871.
(Signed) JNO. B. WELLER,
U. S. Comm'r.

63 No further witnesses appearing the case was continued until to-morrow 9th instant, at 1 o'clock, p. m.

9th FEBRUARY, 1871.

In pursuance of adjournment the examination of witnesses was resumed.

Present, Mrs. Gaines in person, and Mr. McConnell representing the city of New Orleans.

P. E. WILTZ sworn:

He knows the draining-machine property. Has been a real-estate broker for many years. Has known the draining-machine since it was first built.

Quest. About what amount of land is drained by this machine?

Ans. I would say about 100 squares.

Were it not for the draining-machine the property in that vicinity would be subject to overflow, and would be rendered valueless. Previous to the erection of the drainage-machine the property in that section was waist-deep in water and mud. I used to hunt snipe and duck in that section.

64 The ground is about 3 feet below the proper levee, and would require the filling up of that depth to keep it from being overflowed if the drainage-machine was dispensed with.

Quest. What do you estimate the rental value of the draining machine per annum?

Ans. It is difficult for me to say. I have endeavored to ascertain what would be a fair rent, but have been unable to do so.

Quest. Your age is what?

Ans. 63; born in 1808.

Quest. What would you estimate the value of the square upon which this draining-machine is built?

Ans. I would value it at about $2,000, but not more; this is my valuation of the land without the improvements. My occupation as a real-estate broker enables me to form, I think, a correct judgment of the value of land in that locality. I have resided in that neighborhood for 20 years. As late as about the year 1830, all that portion of the city where this square upon which the draining-machine stands was a cypress swamp. The city of New Orleans drained and ditched this land and

65 divided it out into streets and squares, and in many streets made banquets. All around this draining-machine, for many squares, the land is vacant, unoccupied. The smell from the Bayou St. John injures the value of this property very much, and the square on which the draining-machine stands is right on the bayou. The putting up of this draining-machine on this square has not injured the square but has benefitted the same by draining it.

As I live in this locality, I am very well acquainted with the drainage-machine. I used to stop there every day in driving by in my carriage, and conversed daily with the overseer in charge of this machine. This drainage-machine was built over 30 years ago. The draining-machine

and buildings cost about $12,000, I should think; it might have cost more. The draining-machine that is now on the land, is the same that was put up there about 30 years ago. The city of New Orleans has not, to my knowledge, at any time received any money for the running of this drainage-machine; it has on the contrary, during this period, run the draining-machine at the cost of the city. The city government
66 has not levied any tax for running this draining-machine; the expense has been paid out of the general fund of the city. I owned a piece of ground in that section for which I never paid any special tax for drainage of the same, either before or since the drainage-machine was built.

(Signed) P. E. WILTZ.

Sworn to and subscribed this 9th Febr'y, 1871.

(Signed) JNO. B. WELLER.
U. S. Comm'r.

FRANCIS MOUNEY sworn:

I have known this draining-machine near 30 years. Was employed by the city as a clerk in the treasury department for 28 years. I agree with Mr. Wiltz as to the amount of land drained by this machine. I live in the section where this drainage-machine is located. A great portion of the property claimed by Mrs. Gaines is drained by this machine. The city has always run this machine.

Quest. Have you any means of estimating the annual rental value of this property?

67 Ans. I have not; it is a very difficult thing to do.

Quest. The testimony of the witness, Mr. P. E. Wiltz, has been read over in your hearing; is there any statement or fact in it that you do not corroborate.

Ans. No. I corroborate it, so far as I know, and I am pretty well acquainted with all the facts referred to by him, and I know the facts as stated by him, generally, to be correct. I put the same valuation he does on the square of ground on which the machine is located, that is $2,000.00. The improvements are not much, the buildings on this land could be erected for about $3,000. I know nothing of the value of the machinery. The machinery that is there now was put up by Mr. John Community, at the expense of the city. To run the machine requires 1 engineer $150 per month; 1 ass't engineer 75 per month; 1 fireman 30 per month. This was the monthly expense prior to 1868. This was the expense from the city surveyor's pay-rolls; this does not include fuel or repairs. I know that the city never derived any money from the running
68 of this machine. Never specially taxed the property, but the expense was paid out of the general fund of the city. 40 years ago this property was a cypress swamp. I know this of my own knowledge. The city drained it, ditched it, and laid it out in squares, and thus reclaimed it from its condition of an uninhabitable swamp.

(Signed) FRANCIS MOUNEY.

Sworn to and subscribed this 9th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

No further witnesses appearing the case was continued until to-morrow 10th instant, at 1 o'clock, p. m.

10TH FEBRUARY, 1871.

In pursuance of adjournment the examination of witnesses was resumed.

Present, Mr. McConnell, representing the city of New Orleans.

TESTIMONY FOR THE DEFENCE.

Hon. B. F. FLANDERS sworn:

I am mayor of the city of New Orleans. I have resided in this
69 city since January 1, 1843. I am 55 years of age. I know the draining-machine situated at the foot of Orleans street. I remember that the place where the draining-machine is situated was a swamp before it was erected. I know that the draining-machine was erected by the city. The city has run it since it was built. It was run at the expense of the city always. There was no special tax placed on the property, but the expense of running the machine was paid out of the general fund of the city. The property around it was not injured, but on the contrary, was benefitted by the drainage-machine being placed there. The city of New Orleans has never, at any time, nor from any source received any money for running this drainage-machine. There is no possibility by which the drainage-machine could be "let out" to be run under a contract, and the contractor make any money out of it, unless the contractor had a right to tax the property drained. The city has no authority to lay a special tax for that purpose, and never
70 had a right to do so.

(Signed) BENJ. F. FLANDERS.

Sworn to and subscribed this 10th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

W. H. BELL sworn:

I am surveyor of the city of New Orleans, and have been in that capacity for two years; have lived in the city 36 years, but not continuously. I have known this draining-machine 15 years. The city owns this drainage-machine. The cost of erection this drainage-machine is:

The present machine was constructed in the year 1846; the old machine put up in 1836 is completely worn out. The cost of the present machine, taken from the books of the city is, contract price, $28,500.00, which, with interest at 6%, up to the date of settlement, a year or two afterward, amounted to $32,000 about.

The following statement I have taken from the books of my office, and shows the expense of running the machine from the time
71 it was built until the present time.

Orleans draining-engine built in 1846.

John Communy for building the same	$28,500
" " " running same 15 y'rs & 7 mo's	88,825
	117,325
For running same from Aug. 1862, to 1866, 4½ y'rs	7,717
" " " " Jan. 1866 " 1867 under contract	3,870
" " " " " 1867 "M'ch 1870	8,970
	137,882
93 mo's fuel, 20 tons per month, 1860 tons, 7½	13,950
Total amount expended	151,832

I am aware that the city has divided the section drained by this machine, into squares, laying out streets, &c., and reclaimed a large portion of it from its condition as a swamp. The portion reclaimed would amount to about 3 square miles. The value of the land on which this draining-machine is located I put at $1,500 to $2,000; it is about a half a square of ground. The buildings are of no value except as a shelter of the machinery. I estimate the present value of the machinery and boilers $15,000—about that price.

Quest. Could not this drainage-machine be put on the north side
72 of Orleans street and all that portion of the city drained as well?

Ans. Yes, it would have to be moved only a distance of 75 feet.

The city of New Orleans has never received a dollar for running this drainage-machine, but the expense was paid out of the general fund.

(Signed) W. H. BELL.

Sworn to and subscribed this 10th February, 1871.

(Signed) JNO. B. WELLER,
U. S. Comm'r.

No further witnesses appearing, the case was continued until to-morrow, 11 inst., at 2 o'clock p. m.

NEW ORLEANS, 11*th February*, 1871.

No witnesses appearing to-day, the case was continued until Tuesday, 14th inst., at 2 o'clock, p. m.

Rule by complainant.—Extract from the minutes of Friday March 17, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

73 On motion of Myra Clark Gaines, complainant, and on suggesting to the court that John B. Weller, esq., was heretofore appointed in this cause as master in chancery to take account of rents and profits accrued and accruing from property recovered in this suit, and in said order described, from the 26th September, 1834. And that said master in chancery has completed his said report. It is ordered by the court that the city of New Orleans shew cause, on the 24th day of March, 1871, at 11 a. m., why the report of said master in chancery, allowing the rents and profits of the property in controversy at the sum of $532,599.77, should not be approved and made the judgment of the court, and the city of New Orleans condemned accordingly, and at the same time that the claim for repairs, $32,799.80 be disallowed.

Marshal's return thereon.

Received March 18, 1871, by the U. S. marshal, and, on the same day, month, and year, served copies of the within rule as follows:
74 On city of New Orleans, by delivering the same to H. Clarence, mayor's clerk; on James McConnell personally at marshal's office.

New Orleans March 18, 1871.

(Signed) S. W. REED,
D'y U. S. Marshal.

Motion and order to withdraw rule of 17th March, 1871.—Extract from the minutes of Friday March 24, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

On motion of Myra Clark Gaines and on suggesting to the court that, heretofore, to wit, on the 17th day of March, inst., she took a rule upon the city of New Orleans requiring said defendant to show cause this day why the report of the master in chancery made herein should not be approved and made the judgment of the court, and upon further showing that said rule was, under the 83d rule of this court, prematurely taken, it is ordered by the court that she have leave to withdraw the same.

75 *Entry at rules.—Extract from chancery order docket.*

April rules 1871. Monday the 3d.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

The master in chancery to whom this cause was referred with directions to take an account between the parties of the yearly rents and profits of certain property, reported and filed the same in the clerk's office on the 14th of March, ultimo.

Writ of assistance.—Issued 8th April, 1871.

United States circuit court, fifth circuit and district of Louisiana.

The President of the United States of America to the marshal of the United States for the district of Louisiana, greeting:

Whereas lately by mandate of the Supreme Court of the United
76 States, and by decree entered in accordance therewith, on the 11th day of June, 1870, in our said United States circuit court in a certain cause depending therein between Myra Clark Gaines, complainant, and The City of New Orleans and others, defendants, No. 2695 of the docket of said court, it was, among other things therein contained, ordered, adjudged, and decreed by the said courts, that the said defendant, The City of New Orleans should deliver into the possession of the said Myra Clark Gaines the following described property, viz:

All the square of ground comprised between St. Peter street, Hagan avenue, Orleans street, and Lake road, as shown on the sketch annexed to the answer of the said city of New Orleans on file in said suit, and on which the draining-machine for draining the city is located; and also four other squares of ground comprised between Dupre, Salcedo, St. Ann, and St. Peter streets, and whereas a proper affidavit has been made before the clerk of our said court, that Oscar Baron Boisfontaine did make a demand on Benjamin F. Flanders, as mayor of the said city of New Orleans, for the delivery of the said property into her,
77 the said Myra Clark Gaines', possession, according to the tenor and true intent of the said decrees, and that the said Benjamin F. Flanders, mayor of said city of New Orleans, did thereupon refuse to

make such delivery and to obey the said decrees: Therefore we command you that, immediately after receiving this writ, you go to and enter upon the said described property, and that you eject and remove therefrom all and every person or persons holding and detaining the same, and any part thereof against the said complainant, and that you put and place the said complainant or her assigns in the full, quiet, and peaceable possession of the said property without delay, and her, the said complainant, in such possession thereof, from time to time maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of the said decrees of said courts.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at New Orleans, this 8th day of April, A. D. 1871.

78 [SEAL.] (Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Clk.*

Marshal's return thereon.

Received April 8, 1871, by the U. S. marshal, and, on the 11th day of April, 1871, in obedience hereto, placed Mrs. Myra Clark Gaines, plaintiff herein, in possession of the property within described by delivering possession of the same *same* to O. B. Boisfontaine, her agent, and taking his receipt for it.

New Orleans, April 12, 1871.

(Signed) JAMES E. AYER,
D'y U. S. Marshal.

Affidavit of O. B. Boisfontaine.—Filed February 8, 1871, *and referred to in the foregoing writ.*

Circuit court of the United States, district of Louisiana.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS, & AL. } No. 2695.

Personally appeared before the undersigned authority, Oscar Baron Boisfontaine, who, being duly sworn, doth depose and say, that he
79 was authorised by Mrs. Myra Clark Gaines, complainant in above-entitled suit, to demand possession from defendant, The City of New Orleans, of the property and premises described in a certain document hereinbefore set forth and forming part hereof, which said property and premises were lately decreed by the Supreme Court of the United States in said case, to be recovered by said complainant from the said defendant, the said City of New Orleans, and that deponent has made demand from Benjamin F. Flanders, in his capacity of mayor of the said city of New Orleans, who has refused to deliver possession thereof in accordance with said decree, and said Benjamin F. Flanders stated that he would pay no attention to Mrs. Gaines.

(Signed) O. B. BOISFONTAINE.

Sworn to and subscribed before me this 8th day of February, 1871.

(Signed) D. URBAN, *Clerk.*
By F. B. VINOT,
D'y Clk.

80 *Document annexed to and referred to in foregoing affidavit.*

Circuit court of the United States district of Louisiana.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS & AL. } No. 2695.

OSCAR BARON BOISFONTAINE:

SIR: You are hereby authorised to demand from defendant, The City of New Orleans, possession of the following-described property and premises, lately by mandate of the Supreme Court of the United States and by decree entered in accordance therewith, on the 11th June, 1870, in the hon. circuit court for this district, declared to be the property of complainant in the above-entitled suit, and recovered in said suit from said defendant, to wit:

All the square comprised between St. Peter, Hagan avenue, Orleans street, and Lake road, as shown on the sketch annexed to the answer of said city of New Orleans on file in said suit, and on which the
81 draining-machine for draining the city is located; and also four other squares comprised between Dupre, Salcedo, St. Ann, and St. Peter streets, sold at public auction, on the 21st day of December, 1820, under the pretended authority of Richard Relf and Beverley Chew, as testamentary executors of Daniel Clark, deceased, and as attorneys-in-fact of Mary Clark, to Evariste Blanc, and afterwards conveyed by said Evariste Blanc to the said defendant, The City of New Orleans, on the 26th day of September, 1834.

New Orleans, February 4, 1871.

(Signed) MYRA CLARK GAINES.

MEMORANDUM.—The court has appointed John B. Weller, esq., master in chancery, to take an account of the rents and profits of the above-described property since it came into possession of defendant.

Entry at rules.—Extract from the chancery order docket, April rules, 1871.

MYRA CLARK GAINES
vs.
82 CITY OF NEW ORLEANS. } No. 2695.

The complainant herein is notified that the said defendant, The City of New Orleans, has this day filed in writing exceptions to the report of the master, herein filed on the 14th of March, 1871, and that the same are set down for hearing.

NEW ORLEANS, *April* 13, 1871.

NOTA.—The return of the marshal on a copy of the above notice could not, after a diligent search and inquiry, be found, and is therefore either lost or mislaid.

Exceptions of the city of New Orleans to master's report.—Filed April 13, 1871.

U. S. circuit court, district of Louisiana.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

The City of New Orleans, defendant in the above-entitled and numbered suit, now comes into court and excepts to the report made
83 by the master in chancery and filed herein, on the 14th day of March, 1871, as erroneous, incorrect, and as contrary to law and equity, and not in accordance with the order and decree of the court herein, and assigns the following specific exceptions and objections thereto:

I. Because, by the express terms of the order of this honorable court appointing said master, he was required to take only an account of the yearly rents and profits of said lands, therein described, received by said city, during the period only said lands were held or possessed by the city. That the evidence adduced before said master showed that said city had never at any time, or in any manner, received any rents or profits whatever from said property; but, on the contrary, that said city had made an outlay of one hundred and fifty-one
84 thousand eight hundred and thirty-two dollars incurred for cost of erecting and running a draining-machine, for the public benefit solely. That said master found, upon the evidence adduced, the fact to be, and so reports it, that the city received no rents whatever, and no profits or remuneration whatsoever from said lands or property, but erroneously and illegally proceeds to infer from hypothetical statements and surmises, that said city might, could, would, or should have been benefited by the drainage so done by said machine, in some indirect way, by taxation or otherwise, and concluding that equity demanded some compensation, presents for the consideration of this hon. court three hypothetical statements, each setting forth at great length what purports to be data, calculations of interest, &c., &c., for the alleged purpose of illustrating the value of the rental of said draining-machine. That, by the first of said hypothetical statements, there appears to be figured or found, a nett balance against this respondent, The City of New Orleans, for the rental of said machine, amounting to..... $499,819 97
85 By the second..... 208,825 00
By the third..... 125,266 79

Respondent avers and objects that said statements are hypothetical and mythical, and the conclusions therefrom and report and findings thereon, by said master, are erroneous, contrary to law and the evidence and equity, and unwarranted by the orders and decrees of this court herein, and should be rejected and stricken from said report.

II. That said report is erroneous in not having been taken as was ordered, "according to the laws of the State of Louisiana, in cases of such recovery," and more particularly in this:

1°. That, by the laws of Louisiana the right of said complainant to recover rents and profits was barred and prescribed by the lapse of three years from the date that such rents, &c., became due, respectively, and that respondent's rights under said law of prescription were expressly disallowed by said report.

2°. That said master erroneously treated respondent as a possessor in bad faith. Still, if held and deemed to be such, respondent was by
86 said master and by said report deprived of even the qualified and limited protection accorded by the laws of the State of Louisiana to possessors in bad faith, in this, to wit: Respondent represents that as said constructions and works, to wit, said draining-machine and buildings necessary therefor, were made and erected, as is shown by the evidence, by respondent, with materials belonging to said city, then the only right of said complainant as to them was, either to keep the same and reimburse to respondent their value and the price of workmanship, or to require respondent to take away or demolish the same. That the obligation, under the law of Louisiana, rested upon complainant to elect which she would do, to wit, whether she would take and pay for, or require the removal of said constructions and works. And that your respondent demanded of said complainant, through the said master, that she should make such election, and that said master refused to
87 direct or require the complainant so to do, and thus denied respondent her rights under the law.

III. That, by the order of the court herein, the answer of the city and mayor thereof, attested, were to be deemed as true, and to stand until overcome by proof to the contrary. That by said answers (without any proof whatever to the contrary being adduced) it appears that the said half square of ground upon which said draining-machine was erected, was long since reserved from sale, withdrawn from commerce, and dedicated to public use. That, by the laws of the State of Louisiana, said city was invested with power so to withdraw said land from commerce and make such dedication to public use as was done in this instance, and that the sole right of complainant as owner of said half square of land, so expropriated and dedicated to public use, as aforesaid, was to demand and receive from said city the value of said land, to be ascertained in the mode and manner directed by the laws of the said State. That the said city cannot lawfully or equitably be condemned to account to said complainant for rents and profits of a
88 draining-machine so built and owned by the city exclusively for the public benefit, erected upon land so withdrawn from commerce and dedicated to public use.

IV. That in no event can said complainant be allowed by this honorable court, to take the said constructions and works, so made by respondent, without first allowing respondent the just value thereof, as shown by the proof. That the report of said master, by implication, erroneously and illegally allows her so to do.

V. That, at the date said city came into possession of said lands, they formed part of an uninhabitable swamp, and of no appreciable value. That said lands have not been injured, but, on the contrary, improved and enhanced in value by said city, by ditching, and draining, and opening streets through the same, so that the said half square upon which said machine stands appears, from the evidence, to be now worth $1,500 to $2,000.00, and that if the said city is liable at all in the premises,
89 which is denied, then such liability cannot exceed the legal interest upon the value *of* said half square of ground possessed, independent of the enhanced value given to it by the action of the city, and that said master erred in not so reporting.

VI. That, in returning the testimony offered, said master has omitted to include and return the answer of the city and of the mayor thereof, and the act of sale from E. Blanc to said city, testimony offered in evidence by defendant before said master.

Wherefore this respondent makes and files the foregoing exceptions and objections to said report, and prays that they be maintained, and that said report be disallowed and rejected. Respondent prays that said complainant have due notice of the filing of these exceptions, and that the same be heard and determined, and maintained by this honorable court.

(Signed) MILES TAYLOR,
" J. McCONNELL,
Solicitors for City of New Orleans.

90 *Statement of master.—Filed June* 12, 1871.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 2695.

MYRA CLARK GAINES *vs.* LIZARDI ET AL. } No. 2734.

In the circuit court of the United States for district of Louisiana.

In the above entitled and numbered cases, I hereby certify that in the proceedings had before me, as master herein to take accounts of rents and profits under the order of this honorable court, the complainant appeared in person, the defendants appeared by their counsel of record, and made objections to the testimony and proceedings as they progressed, and cited authorities in support of the objections and points so made.

That the defendant The City of New Orleans, besides other evidence, specially offered in evidence the title of the city (already on file
91 with the papers before me) from Evariste Blanc, passed before , a notary public, the day of , 1834, and also the answer of the city of New Orleans, sworn to by the mayor thereof; filed in said suit No. 2695.

That the defendants, by their counsel, cited article 500 of the civil code of Louisiana, and cited authority in support and explanation, and stated that he would call upon the complainant, (then present,) through me as master, to elect, under said article, whether she would keep said works and improvements, placed upon the land by the defendants, or pay the defendants for the same.

The master regarded this as a mere notice of what the defendant intended to do at some future time, but as the point was not presented in writing nor subsequently alluded to, he had a right to assume that it had been abandoned.

(Signed) JOHN B. WELLER,
Master in Chancery,

NEW ORLEANS, LA., 10TH JUNE, 1871.

92 *Answer of the city of New Orleans.—Referred to in the foregoing statement.*

NEW ORLEANS ET AL *ats* MYRA C. GAINES. } No. 2695.

Answers of city of New Orleans, E. H. Lameyer, Dominique Lanata.—Filed April 22, 1857.

CITY OF NEW ORLEANS & ALS. *ats* MYRA C. GAINES. } No. 2695. In chancery.

Circuit court of the United States in and for the eastern district of Louisiana.

The joint and several answer of the city of New Orleans, a corporation duly established by law, Ernest Henry Lameyer, and Dominique Lanata, three of the defendants to the bill of complaint of Myra C. Gaines in the above-entitled case.

The said named three defendants, and each of them for himself, now and at all times hereafter, saving and reserving unto themselves, and each reserving unto himself, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's bill of complaint contained, for answer thereunto, or to so much and such parts thereof as they are, and each is, respectively advised are, or is material or necessary for them to make answer unto, these defendants, and each for himself, answering, saith:

That the said complainant, in and by her said bill of complaint, hath not made such a case as entitles her, in a court of equity, to any discovery or relief from or against these defendants, or from either of them, touching the matters contained in her said bill, or in reference to any such matters, and that this appearing on the face of the bill itself, they and each for himself, now here urge, by way of answer and defence, and not intending to waive the same by any portion or parts of this their joint and several answer to the allegations stated in said bill of complaint, and as therein detailed and hereinafter set forth, traversed, answered, or avoided.

And, further answering, said defendants, by protestation, &c., saith that, not confessing, &c., say:

That it appears, by the said bill of complaint of said complainant, that Richard Relf, Beverly Chew, and Mary Clark, therein respectively named, are necessary parties to said bill of complaint if they or either of them be now living, and if they or any one or more of them be not living, then and in that case the heirs or legal representatives of such one or more of said named person or persons—inasmuch as it is shown by said bill of complaint that said Daniel Clark, in his lifetime, did make his will and testament, appointing said Richard Relf and Beverley Chew the executors thereof; that the said will was duly probated; that it doth not appear, by said bill of complaint or otherwise, that the said probate hath ever been called in or otherwise revoked; that it is attempted, in and by said bill of complaint, to call in question the legality of the acts and doings of said Richard Relf and Beverly Chew, in and about the title to the property in said bill described and named, and under which, it is alleged in said bill, these defendants hold the same. And it doth appear, furthermore, in and by the said complainant's said bill of complaint, that the said Mary Clark did claim the said property named in said bill of complaint, and through her agents had sold, and assumed to sell the same to these defendants herein; but yet the said complainant hath not made the

said Richard Relf, Beverly Chew, and Mary Clark, or either of them, nor in case of the death of one or more thereof, hath she made the heirs or legal representatives of such deceased party or parties named in her said bill of complaint, party or parties to her said bill of complaint. Wherefore these defendants, not admitting any of the allegations in said bill of complaint to be true, nor waiving and defence made thereto in any subsequent part of this their answer, but wholly insisting thereon, doth set forth and now urge this special matter of defence:

96 that they, nor should either of them, be held to answer the said bill of complaint, or to proceed further in the defence of the complaint set forth in said bill of complaint, until the complainant shall make such-named persons or their legal representatives parties to her said bill of complaint, to the end that justice may be done, and the proper parties called to defend their own acts—such as are complained of in said bill of complaint. And, specially reserving to themselves all advantage of the subsequent part of this their answer, they submit, as an equitable defence to said bill of complaint, the matters now here answered and set forth.

And, for further and other answer, by protestation, &c., not confessing, &c., say: That, in and by said bill of complaint, it is stated and charged that the said Daniel Clark therein named was, during his life, and at the time of his death, seized in fee and lawfully possessed of the real estate in said bill of complaint named, and yet the said complainant hath not,

97 in any part of said bill, by reference or otherwise, disclosed the title-papers, or where the same may be seen, found, or inspected, whereby it is supposed that the said Daniel Clark, during his lifetime, or at the period of his death, as charged, was the lawful owner of said described real estate in the bill of complaint referred to. Wherefore the defendants, by protestation, &c., not admitting, &c., nor in any manner otherwise relying upon the specific allegations of this answer than as the same may serve in case of need, doth insist that the said bill of complaint should be dismissed, because a want of such full and just showing of title in Daniel Clark, at the time of his death, in and to each and all of said several pieces and parcels of land and lots in said bill of complaint described, and charged as being in the possession of these defendants respectively, as would show title therein and thereto in the said complainant, if all of the other parts and portions of her said bill were taken as true, which are not admitted to be true by the defendants.

98 And the said defendants, by protestation, &c., for further and other answer to the said bill of complaint, not admitting, &c., but wholly denying, &c., doth say: That it doth appear, in and by said bill of complaint, that it hath been judicially decreed, by a court of competent jurisdiction, that the said complainant is not the heir-at-law of said Daniel Clark in said bill of complaint named, and that there hath been a will of the said same Daniel Clark ordered to be probated in the second district court of New Orleans, in the month of February, 1856, whereby, as it is alleged in the said bill of complaint, but not admitted by the defendants, the said Daniel Clark did will and bequeath to complainant his (the said Daniel Clark's) property, with the exceptions stated, and that F. De La Croix, with others, was appointed an executor thereof. Wherefore the said defendants doth answer and insist upon the same as a defence to the said bill of complaint; that the said second district court of New Orleans, according to the showing of

99 the said complainant in her bill of complaint, hath exclusive cognizance of said supposed testamentary succession of the said

Daniel Clark, and that it doth also appear, by said bill of complaint, that the said second district court of New Orleans being seized of the jurisdiction over the entire subject-matters of said supposed testamentary succession of the said Daniel Clark, hath alone power and authority to cause the same to be duly and faithfully administered under the laws of the State of Louisiana, to cause the property to be properly and lawfully inventoried, the debts and legacies to be fully paid, all of which alone can be done by executors and dative executors; that the same is to be done contradictorily with the heir-at-law of the said Daniel Clark; and, after the whole shall have been duly administered, the remainder, if any, is to be handed over to the heir-at-law of the said Daniel Clark; that, if said complainant hath any claim upon said succession of said Daniel Clark, as legatee under any supposed will of his, it can only be claimed in due course of the adminis-
100 tration of said succession, and according to the whole showing of said complainant, as set forth in her said bill of complaint, she cannot have and maintain her present action upon supposed specific property, in manner and form as she hath and is attempting in her said bill of complaint. This defendant doth, therefore, here and at all times insist that this honorable court is wholly without jurisdiction by reason of the facts disclosed in said bill of complaint, to have and maintain the present bill of complaint, or any such like matters, thus bringing into collision the authority of this honorable court, with that of the aforesaid second district court of New Orleans in the matter of the disposition of the property alleged by complainant to belong to the succession of the said Daniel Clark in the bill named; that, if the statements in the said bill be true in this behalf, which are not admitted, it would be within the exclusive province of said second district court of New Orleans to cause said real estate to be sold for the pay-
101 ment of debts and special legacies of the deceased, Daniel Clark; therefore, that this bill should be dismissed upon the said disclosures contained therein, and all of which these defendants now put forth and insist upon as part of their answer and defence to said bill of complaint.

And the said defendants, by protestation, &c., not confessing, &c., but wholly denying, &c., for other and further answer to the said bill and defence thereto, doth say that it doth appear in and by sundry allegations in the bill of complaint contained, that, at the time of the death of the said Daniel Clark in said bill named, he, the said Daniel Clark, did leave, him surviving, a forced heir, namely, his mother, Mary Clark; that said Daniel had, therefore, no faculty in law to dispose of his succession or estate to the exclusion of his said forced heir, and the said complainant could not have and maintain her said bill in this behalf filed, because of the entire want of equity in her said bill, with-
102 out a showing on her part that all such and such like questions have been first fully disposed of, or otherwise making all persons having such outstanding interest in law and equity parties to her said bill. Wherefore these defendants doth insist upon all such matters appearing upon the face of said bill of complaint as a full answer thereto and a just and equitable defence to the same.

And by protestation, &c., not confessing, &c., the said defendants doth furthermore answer to said bill of complaint, and say that there is nothing in said bill of complaint stated and set forth which if true are but such matters and things as are fully cognizable on the law side of this honorable court, and would be relieved by the known rules of the common and usual laws of Louisiana; that therefore said complain-

ant should be left to her remedy at law, and this honorable court, on the equity side thereof, should not take cognizance of the matters
103 and things in said bill of complaint contained, and this the said defendants' answer to the said bill as a defence to the same.

And for other and further answer unto said bill of complaint by protestation, &c., not confessing, &c., the said defendant saith, according to the showing in the said complainant's bill of complaint, (great lapse of time hath intervened between the supposed transactions complained of by complainant and the institution of the present action,) that said time so elapsed is greatly beyond the time allowed by law for the institution of suits; that the time allowed by law for the institution of actions of and for such matters as are set forth in said bill of complaint, hath long since elapsed; and any cause of action, if any she ever had, by means or because of anything stated in said bill of complaint, hath long since been and is wholly barred by prescription and the statutes of limitation of the State of Louisiana. That the claim of the complainant, as stated in her bill of complaint, is so old and
104 antiquated as to have divested it of all right to any consideration in a court of equity, if any it ever had. That by the laws of Louisiana prescription (to wit, the lapse of time,) is a mode, when accompanied with actual possession, of acquiring property. That, by the showing of the complainant in her said bill of complaint, these defendants have and each of them hath been in the actual possession of the property described in said bill of complaint for a period of time sufficient to give them and each of them a perfect ownership thereof, as against all claimants whatsoever, and especially against complainant; and their respective titles thereto cannot any longer be questioned by complainant for any cause whatsoever, and especially for any of the several causes stated in the complainant's bill of complaint. All of which they, the said defendants, jointly and each for himself, severally, doth forth for answer and defence to said bill, and as a good and sufficient title to them and to each of them, to all and singu-
105 lar the real estate alleged in said bill of complaint to be in the possession and claimed by them respectively; anything in said bill of complaint to the contrary notwithstanding.

And the said defendants, further answering, by protestation, &c., saith, that Daniel Clark in said bill named, formerly resided and was domiciliated in the parish and city of New Orleans, in the State of Louisiana; that he never was married, but lived and died a bachelor; that, on or about the 20th day of May, A. D. 1811, he then being alive, did make his last will and testament, in olographic form, dated on the day and year last aforesaid, which was entirely written, dated, and signed by himself, the said Daniel Clark; that the said will was, as these defendants are informed and believe, nearly, if not exactly, in the words and figures following, to wit:

"In the name of God, amen!

"I, Daniel Clark, of New Orleans, do make this my last will and testament:

"Imprimis. I order all of my just debts to be paid.

106 "Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all estate, whether real or personal, which I may die possessed of.

"Thirdly. I hereby nominate and appoint my friends Richard Relf and Beverly Chew my executors, with power to settle everything relating to my estate.

(Signed) "DANIEL CLARK.

"NEW ORLEANS, 20*th May*, 1811."

That the said Daniel Clark departed this life in the month of August, 1813; that after his death the said will was duly presented to the honorable the judge of the court of probates, who had exclusive jurisdiction of the subject-matter of the probate of wills, and its probate was then and there prayed for by Richard Relf, one of the testamentary executors therein named—the other, Beverley Chew, being then absent—and thereupon, to wit, on or about the 27th day of August, 1813, the said court of probates ordered, directed, and decreed the execution and probate of said will, and granted unto the said executor,
107 Richard Relf, letters testamentary thereon, with the will annexed; and also, afterwards, to wit, in the month of January, 1814, the same court did grant letters testamentary on said will to the other executor therein named, namely, unto Beverley Chew, which said probate forever thereafter hath remained and still remains unrevoked, unreversed, or in any manner or form called in or affected; that said probate hath remained a judgment in rem against all the world for upwards of forty-three years, and still remains without any successful attempt by anyone to disturb or molest it; that in the year 1834 the complainant in this bill, with her then husband, William W. Whitney, did institute a direct action in said court where said judgment of probate is, the object and purpose of which was to cause a revocation of the said judgment, and to annul the same; that after issue had been joined upon her allegations, and some progress had been made in the taking of testimony, the said present complainant, with her then said husband,
108 voluntarily abandoned their suit, refused to prosecute the same further, and suffered their suit to be dismissed.

And the said defendants, by protestation, &c., not confessing, &c., for further and other answer unto said bill of complaint saith that the hereinbefore-named Mary Clark, the mother of said deceased, Daniel Clark, in and by the will aforesaid of her said son, Daniel Clark, was made and constituted the sole instituted heir of the said Daniel Clark, of his entire estate, real and personal, as she was also his sole and only heir-at-law; that, after the death of the said Daniel Clark and the probate of his will as aforesaid, the title to the property owned and left by the said Daniel Clark, after the payment of his debts, vested absolutely and irrevocably in the said Mary Clark on her signifying, either directly or indirectly, openly, expressly, or tacitly, her intention to accept the said succession of the said Daniel Clark; that the said Mary Clark did, both expressly and
109 tacitly, accept the said succession of the said Daniel Clark, and on or about the 1st of October, A. D. 1813, she, the said Mary Clark, did make, execute, and deliver her certain mandate or power of attorney, in the city of Philadelphia, unto Beverley Chew and Richard Relf, thereby constituting said Chew and Relf her attorneys-in-fact, with full and specific powers, jointly or severally, for her, the said Mary Clark, and in her name to take possession of and to hold all and every part and parcel of the real and personal estate of the said deceased, Daniel Clark, to manage, direct, bargain, agree for and make sale of the same, or any part thereof; to receive and receipt for, to grant acquittances and discharges in due form of law; to make, execute, and deliver such acts, deed or deeds as might be necessary for the conveyance or assurance of any real estate, &c., and generally in the premises to do, execute, and perform all and whatsoever shall be requisite and
110 necessary in as full and ample a manner, to all intents and purposes, as she, the said Mary Clark, could have done if she had been personally present; promising and engaging to ratify whatsoever

the said Richard Relf and Beverley Chew, or either of them, might do or cause to be done by virtue of said power of attorney, which said power of attorney was duly executed by the said Mary Clark, on or about the day and year as aforesaid, and was subsequently received and accepted and caused to be made a public act, according to the laws of Louisiana, by the said Richard Relf and Beverley Chew and each of them; a copy of which said power of attorney is filed in this suit as an exhibit, marked No. *, H. E. L.—D. L., No. 2, and is made part of this answer.

And, further answering, &c., the said defendants say that, inasmuch as the said Daniel Clark had, by his will, which had been duly probated as aforesaid, appointed, constituted, and named his mother, Mary Clark, his sole and universal heiress and legatee, who, subsequent to the
111 death of the said Daniel Clark, accepted the estate of the said Daniel Clark without benefit of inventory, and gave and granted unto the said Beverley Chew and Richard Relf, severally, full and specific authority, as before in this answer set forth, it was not necessary that the sale of any part or parts of the estate, real or personal, of the said deceased, Daniel Clark, should be made at public auction or in any other way or manner than *as* such as, in their opinion, would best promote and secure the interest of said estate and the said Mary Clark.

And for further answer, these defendants say that when the said will of the said Clark was admitted to probate as aforesaid, the said Beverley Chew was temporarily absent from the State, and that letters testamentary, with the said will annexed, were not granted unto the said Beverley Chew until the 21st day of January, 1814, and that during all this interval, to wit, from or about the 27th of August, 1813, till the 21st of January, 1814, the said Richard Relf was the sole acting test-
112 mentary executor of the said deceased, Daniel Clark.

And the said defendant Ernest Henry Lameyer, herein answering for himself alone and separate from his co-defendants, saith: To all and singular that portion and all parts of said bill of complaint which charges or charge this defendant Ernest Henry Lameyer with having obtained or acquired by fraudulent or unlawful means, and for a nominal and inadequate price, possession and ownership of the said pieces, parcels, and lots of ground in said bill of complaint described as in possession of this defendant Ernest Henry Lameyer, says expressly that he, the said defendant, became, without fraud or simulation, and for good, lawful, adequate, and full consideration the rightful possessor and owner of said pieces, parcels, and lots of ground as herein more fully described, and in manner following, to wit:

That Daniel Clark, late of the parish and city of New Orleans, being possessed of the title thereto, and being an unmarried man, but
113 having a forced heir living, to wit, his mother, Mrs. Mary Clark, and having no lawful or legitimate descendants, did, in the month of May, 1811, make his olographic will and testament as aforesaid, whereby he, the said Daniel Clark, did give and bequeath to his said forced heir, Mrs. Mary Clark, all of his estate, real, personal, and mixed, which he, the said Daniel Clark, might die possessed of; which said will was duly admitted to probate in manner and form as aforesaid after the death of him, the said decedant and donor, to wit, in the month of August, 1813; that, by the death of said Daniel Clark, she, the said Mary, being his only surviving heir-at-law, became, by the death of said Daniel Clark, seized, by force of law, of the succession of her said son, Daniel Clark, and of all the property, real, personal, and mixed, of which he died possessed; that she, the said Mary Clark, besides being the sole sur-

viving heir-at-law of said Daniel Clark, was also the instituted
114 heir of said Daniel Clark by his will aforesaid, and thereby also became entitled to the whole of the estate of him the said Daniel Clark, of which he died possessed; and among other parcels, pieces, and lots the same identical property now claimed from this defendant Ernest Henry Lameyer by the complainant; that the will of said Daniel Clark, having been duly probated after his death as aforesaid, she, the said Mary Clark, did accept the succession of her said son, who died, leaving no lawful descendants, and no other ascendant than the said mother, both as universal heir-at-law and as the universal testamentary heir of him, the said Daniel Clark; and being thus lawfully possessed of said property, as absolute owner, she, the said Mary Clark, mother of the said Daniel Clark, and acting with the most perfect good faith, did take possession of said property; that, being thus possessed of said property as owner, and residing out of the State of Louisiana, to wit, at Germantown, near Philadelphia, Pennsylvania,
115 she did, on or about the day of October, 1813, make and deliver to Richard Relf and Beverley Chew, then both residing in New Orleans, Louisiana, her special and general power of attorney, authorizing them jointly or severally to act for her, and in her name to take possession of the succession, property, goods, rights, credits, moneys, and effects of said deceased Daniel Clark, and for her and in her name, to sell the same, in whole or in part, and, from time to time, as they could advantageously do so for the interest of her, the said Mary Clark; that said Richard Relf and Beverley Chew, in their respective capacities, as executors of the will of Daniel Clark, and especially acting as the mandatories of her, the said Mary Clark, who was then the sole owner of said parcel of ground or lots herein described in possession thereof, endowed to all intents and purposes whatsoever, with the same rights and faculties to sell and convey the same, as he, the
116 said Daniel Clark had, in his lifetime, or would have had if he had still survived, did, on the 29th day of December, 1820, by public and authentic act, passed before Savinien Blanc, then a notary of the city of New Orleans, sell and convey unto Etienne Debon, then also of said city, two lots of ground, situated in this city, designated as lots one and two, on a plan drawn Mr. Charles L. Trudeau, then Spanish surveyor general, in the year 1801, a copy of which plan is annexed to an act in the office of Theodore Seghers, late a notary public of this city, bearing date the 1st of December, 1835, and the original of which, was deposited in the office of Pierre Pedesclaux, a notary public in this city, and which said two lots joined each other, and together formed the corner of Toulouse and Burgundy streets in the city of New Orleans, being the north corner of said streets, and together, measuring one hundred and twenty feet front on Toulouse street, by one hundred and twenty feet deep, and front on Burgundy street, French
117 measure, together with all of the buildings thereon; that the said Stephen Debon, when he purchased said two lots of ground from said Mary Clark, did so in good faith, without any knowledge whatsoever, or having any suspicion or cause to suspect the existence of any of the pretended facts stated in the bill of complaint of her the said complainant; that he actually paid a full and valuable consideration therefor in good faith; that as part and parcel of the price and consideration so paid and assumed by him, the said Debon, for said two lots of ground, the fact was, that there existed upon said lots a perpetual ground-rent in favor of the city of New Orleans; for that, whereas, the said ground was sold in the year 1801, by order of the Spanish

government, the then sovereigns of the country, and the owners of said ground, which sale was made for the use of the city of New Orleans, and the said two lots of ground, one and two, then sold for $1,820 payable at the purchaser's will, on his paying an annual and perpetual rent of five per cent. on said capital, which said obliga-
118 tion rested as a mortgage upon said two lots of ground in favor of said city of New Orleans; that when said Daniel Clark acquired said two lots of ground, he assumed to pay the said sum of $1,820, with interest as aforesaid; that he did not pay the same or any part of said sum of $1,820, nor had any person for him or for the said Mary Clark, his heir, so that the said Debon assumed the payment of $1,820, with all future accruing interest thereon from the date of his sale; that said Debon took actual possession of said two lots of ground after his purchase, and openly and publicly manifested his possession as owner thereof, forever thereafter, until he sold the same as hereinafter stated; and for the balance of the price agreed to be paid by him, the said Stephen Debon, for said two lots of ground, to wit, the sum of $8,000, payable in one, two, and three years from the 19th day of December, 1820, he, the said Debon, gave and delivered to said Mary Clark or her agents, representing the succession of Daniel Clark, three notes, each for the sum of $2,666⅔ secured by mortgage on said
119 lots, and which were subsequently duly paid, and which was an ample, full, and adequate price for said two lots of ground; all of which said several facts will fully appear, by inspection of the duly certified copy of the authentic act aforesaid hereto annexed, and marked Exhibit L, No. 1, and made part of this answer, in the same manner and to the same extent as if it had been fully transcribed in this answer of this defendant; that by virtue of said proceeding the said Debon did acquire a good and lawful title to said property, and to which good and lawful title this defendant hath sueceeded, and he accordingly claims title to said parcel of ground with the improvements thereon under title thus acquired from Daniel Clark, from Mary Clark, and said Stephen Debon.

That said Etienne Debon, being thus possessed in lawful ownership, did, by public and authentic act, passed before Marc Lafitte, then a notary public of the city of New Orleans, on the 7th day of January, 1824, sell and convey to L. & M. Commagere the same identical property in good
120 faith, for a valuable consideration actually by him paid to said Debon, in manner and form, as more fully and at large will appear by inspection of the accompanying duly authenticated copy of said act of sale from said Debon to said L. & M. Commagere, marked L, No. 2, and made as an exhibit a part of this the separate answer of said defendant Lameyer, as fully as if it had been transcribed herein. That the said L. & M. Commagere thus became the lawful owners of said lots of ground in good faith, for valuable consideration, and to whose title and good faith this defendant hath succeeded, and now claims ownership to said title and property.

That the said L. & M. Commagere, being thus in possession of said lots in good faith, for a valuable consideration, actually paid by them, did, by authenticated public act, passed on the 18th day of April, 1827, before Louis T. Caire, then a notary public of this city, sell, transfer, and convey for a valuable consideration, actually paid according to the tenor and effect thereof, unto Charles Rene Gatien Oger, the same
121 lots of ground so owned by them as aforesaid, all of which will also more fully and at large appear by the exhibit hereto annexed, marked L, No. 3, and now made part of this answer to the same extent

as if it had been transcribed herein, the original of which was duly recorded in the office of the recorder of conveyances, according to law. That by said several proceedings, acts, sales, and conveyances, the said Oger became the true, lawful, and equitable owner and possessor of said lots of ground, in good faith, and for a valuable consideration, and to whose title, faith, and rights, this defendant hath succeeded, and is the possessor and owner of said lots.

That said Oger, being thus the possessor and owner of said lots did, by public and authentic act, passed on the 20th day of May, 1833, before Louis T. Caire, then a notary public of the city of New Orleans, sell, deliver, and convey said lots of ground unto Francois Hypolite Petitpain, for a good, lawful, full, just and adequate consideration the same lots, parcels, or pieces of ground, and all of which will more fully and
122 at large appear by inspection of the duly authenticated copy of said act, herewith filed as part hereof, as exhibit marked L, No. 4, and made part of this answer in the same manner and to the same extent as if it had been transcribed herein. That, by virtue of said several proceedings under conveyances from Daniel Clark and others, downwards thereto, the said Petitpain became, by his said purchase, the true and lawful owner of said lots, parcels, and pieces of ground in his said title described, and which said title was duly recorded in the conveyance office of the parish of Orleans, according to law, which will appear by the certificate of said Exhibit L, No. 4, and also made part of this answer. That the said purchase of said Petitpain was made in good faith and for a valuable consideration, actually paid; and this defendant is now the owner of said lots, and is entitled to every equitable consideration belonging to the good faith of said Petitpain.

That the said Petitpain, being thus the possessor and lawful
123 owner of said lots of ground, did, by public and authentic act, dated September 30, 1836, passed before Felix Grima, then a notary public of this city, sell, transfer and convey unto this defendant, for a full, adequate, and lawful price and just consideration, said lots of ground. That said act of sale from Petitpain to this defendant was duly recorded in the office of conveyance in the parish of Orleans, on the 18th of October, 1836; all of which several facts will more fully and at large appear by inspection of the annexed duly authenticated copy of an act of sale from said Petitpain to this defendant, and the certificate thereon hereto annexed, as Exhibit L, No. 5, and made part of this answer in the same manner and to the same extent as if the same had been transcribed herein, and as part hereof.

Thus this defendant saith that he claims title to said two lots of ground hereinbefore more particularly described by metes and bounds. That said Petitpain purchased it from C. R. G. Oger; that Oger purchased said lots from L. & M. Commagere; that said Commagere frères purchased the same from Etienne De Bon; that said De
124 Bon purchased the same from Mary Clark; that Mary Clark inherited the same from her son, Daniel Clark, under a will duly made, probated and ordered to be executed.

This defendant, for his separate answer, saith, furthermore, that though he is not bound to make disclosure of his titles, having a right to insist that the complainant hath no title to call for a disclosure, yet, further answering, he saith that after the death of said Daniel Clark his last will and testament was duly probated as aforesaid, in the month of August, 1813, where it remains of record in the probate court for the parish of Orleans; and the executors therein and thereby appointed, qualified and took upon themselves the administration of the effects of

the succession of Daniel Clark, and letters testamentary were granted to them by said court of probates.

This defendant saith furthermore that he is advised by counsel that the legal effect of those proceedings were to vest the property of Daniel Clark in said executors, Richard Relf and Beverley Chew, for
125 purposes of administration, the payment of the debts of the said deceased, Daniel Clark, and that the same was thus held until the heir-at-law and the instituted universal heiress and legatee appeared or sent her power of attorney; that so soon as said heir-at-law and testamentary instituted universal heiress, Mary Clark, sent her power of attorney, and accepted the succession of her deceased son, Daniel Clark, as she did, that the entire title of, in, and to the entire estate and all of the effects thereof, personal, real, or mixed, of which Daniel Clark died possessed, or in which he had an interest, immediately and by force of law vested in said Mary Clark, as of the day of the death of Daniel Clark, she having accepted said succession, subject only to the rights and duties of the testamentary executors to retain such possession of all or so much as might be necessary to pay the debts of the said succession of Daniel Clark; that the decree ordering said will to be executed was a valid decree as to the genuineness of said will, and
126 that all acts done under it according to law are valid acts, so long as the same remain unreversed; and that any act done in pursuance or in furtherance of it, even if not in accordance with law or its prescribed forms, if done while said will was unreversed, can only be called in question by said Mary Clark or those claiming under her.

And now the said defendant The City of New Orleans, for her separate answer herein in this particular behalf and for herself alone, saith of and respecting, and in answer to so much and such parts of the bill of complaint as charges this defendant to be in possession and claiming certain properties in said bill attempted to be described, that by public authentic act, passed before Peter Pedesclaux, then a notary public of this city of New Orleans, dated on or about the 30th of October, 1821, Richard Relf and Beverley Chew, therein acting as the agents and attorneys-in-fact of Mary Clark, the then owner of the property, under a general and special power of attorney from the said Mary Clark,
127 then residing in the State of Pennsylvania, which said mandate of attorney was dated on or about the 2d of October, 1813, and duly and lawfully deposited in the office of John Lynd, then a notary public of this city, on the 22d of April, 1817, and also appearing in their own individual and personal names, did sell, grant and convey unto Evariste Blanc, a portion of ground situated on the Bayou St. John, containing about one hundred and thirty-five superficial arpents, extending to the road of the canal Carondelet, to the lands of Mr. M. Cauchoix, to Broad street, to Bellechasse street, in Faubourg St. John, to the lands of the Widow Hersey and to those of said Blanc, owned by other titles at the time, and to the Bayou St. John, the whole conformably to a figurative plan made by the late Joseph Pilié, then surveyor of the city of New Orleans, dated 20th of August, 1821, and which plan was made part of the act of sale from said Mary Clark, and of Beverly Chew and Richard Relf to said Blanc aforesaid, was signed by the parties and the witnesses to said sale and conveyance, and is more particularly
128 marked and designated on said plan as the parts comprised between the letters B, C, D, E, F, G, H, I, K, L, B.

That said property was offered for sale at public auction by Toussaint Mossy, then a public auctioneer in said city of New Orleans, on the 21st of December, 1820, by directions of said Chew and Relf; that at

said public sale, said Blanc being the highest and last bidder for said property, it was duly adjudicated to him by said auctioneer at the price of $4,760, payable on certain terms and conditions; that said act before said notary, Peter Pedesclaux, on the 30th of October, 1821, was in confirmation of said adjudication, and in compliance with the terms and conditions of said sale, he, the said Blanc, did, at the time of the said act, give to said Messrs. Chew and Relf, who, therein signing said act, acknowledged the receipt in their said capacities and granted discharges therefor, the three several promissory notes of said Blanc of $1,586.66⅔;

that said three notes were subsequently and at maturity duly paid
129 to said Chew and Relf, who applied the same towards the payment of debts due and owing by Daniel Clark at the time of his death; that said price so paid by said Blanc was a full, fair, and adequate price for said pieces and parcels of ground at that time; that the value was ascertained by the fact that it was offered and sold at public auction; that said Blanc thereupon took public, open, manifest, and notorious possession of said lands and continued to enjoy the same uninterruptedly and publicly until he sold the same as herein stated; that said property purchased by said Blanc was in good faith, without the least notice or suspicion on his part of any adverse claim against said Mary Clark by any person or persons whatsoever, and especially had he no notice or suspicion of any claim on the part of her, the said complainant, by means of anything stated in her present bill of complaint, or upon any other grounds whatsoever, nor indeed had she at the time

any knowledge of even the physical existence of her, the said com-
130 plainant; that a duly authenticated copy of said act of sale from the agents of Mary Clark to the said E. Blanc is now herewith filed and made a part of this separate answer of the defendant The City of New Orleans, and made Exhibit N. O., No. 1. And this defendant sets forth as a part of her defence in this behalf the purchase of said Blanc; his entire and perfect good faith, his public purchase, his open and notorious possession of the property in question, his payment therefor of a full and adequate price, all of which inures to this defendant, and should avail in equity and good conscience as a perfect defence by this defendant against the unjust and inequitable pretensions of complainant.

And this said defendant The City of New Orleans, for further separate answer in this behalf, saith that the said E. Blanc being the owner of the property hereinbefore described, and being also the owner and

proprietor of divers and sundries of other pieces and parcels of
131 ground, lots, squares, and parts of squares by sundry titles in no manner or form whatsoever derived from Daniel Clark or from any other person or persons claiming under him or his heirs, assigns, or legatees, which said other pieces and parcels of land and lots lay contiguous to each other, and the whole together lay adjoining or contiguous to the aforesaid comparatively small piece of land, so as aforesaid acquired by said Blanc from Mary Clark, and he, the said E. Blanc, being thus possessed, and having full ownership vested in him of said section or district whereof said purchase of Mary Clark formed part, did, by public act before Felix D. Armas, then a notary public of said city, on or about the 26th day of September, 1834, sell and convey unto the then corporation of Mayor, Alderman, and Inhabitants of the City of New Orleans a larger tract, piece, or parcel of ground and lots than that he had acquired as aforesaid from said Mary Clark; that in the

said sale from Blanc there is no particular designation of the
132 piece purchased from Mary Clark, other than by a reference to

the title aforesaid by which he acquired; nor is there any specification of the estimated value of said particular piece in reference to the whole which he sold; but the totality of the purchase by the Mayor, Aldermen, and Inhabitants of New Orleans, of said Blanc as aforesaid, is described in the act of sale aforesaid of the 26th of September, 1834, as a lot and dwelling situated in the parish of Orleans of irregular form, having about eleven arpents fronting on the Bayou St. John, and bounded by said bayou, the canal Carondelet, the road called the "Bayou road," and D'Orgenoy street, which land is, in total, about two hundred and forty superficial arpents, together with all of the buildings, circumstances, and dependencies of the said land, without excepting or reserving anything; that the total price paid and agreed to be paid to said Blanc by said Mayor, Aldermen, and Inhabitants of New Orleans, for
133 the total of said property sold to them by said act, was the sum of forty five thousand dollars, payable in thirty years in the obligations of said corporation, bearing an annual interest of five per cent., payable every six months, the whole counting from the 15th of September, 1834; and said corporation issued and delivered to Blanc her forty-five bonds, each for $1,000, dated September 15, 1834, and each of said bonds were accompanied with coupons payable every six months, on the rate thereof from said 15th of September.

And for other and further answer in this behalf the said defendant saith that the title-papers by which said Blanc held the said total property as aforesaid, are all recited in the act of conveyance aforesaid, from said Blanc to said corporation, and all of which said several facts will more fully and at large appear by reference and inspection of the duly authenticated copy of the notarial act aforesaid, of the 26th of September, 1834, from Blanc to said corporation, hereto annexed as part of
134 the separate answer of this defendant The City of New Orleans, and made Exhibit N. O., No. 2; that the sale of said Blanc was accompanied by an actual delivery of the property described to his said vendee; that the price his said vendees paid, and to be paid, was a full and adequate consideration therefor; that the price, in manner agreed upon, was actually paid; that the vendee was in perfect good faith in said acquisition, paid a full and adequate consideration for the same, took open, public, and notorious possession thereof, exercised dominion of an owner over the same, had no notice whatever, directly or indirectly, of any adverse interest to said Blanc in and to said property or any part thereof; and especially had not said vendee, last aforesaid, any knowledge, information, suspicion, or belief of, or respecting any supposed claim of the complainant in and to any part or parcel of said lands, or, indeed, at that time, that there was any such person in existence, as the said complainant; all of which said several facts these
135 defendants set forth as part of this their answer to said bill of complaint and as an ample defence to said bill and all of its parts.

And furthermore, this defendant in this behalf saith that the aforesaid sale was made, as before stated, to the Mayor, Aldermen, and Inhabitants of New Orleans; that said intellectual being then existed as a judicial person, but subsequently the same was dissolved by a public law of the State of Louisiana, and the territorial jurisdiction of said corporation was divided by law into three parts called municipalities, and were numbered one, two, and three; that, by provisions of law, all of the real property situated within either of said municipalities was made to vest in the municipality within which it happened to lay; that this property now in question was situated within the territorial limits of Municipality No. 1; that, subsequently, by public law of the

State of Louisiana, the said municipalities were dissolved, and the entire territorial jurisdiction of the whole was consolidated into
136 one corporation, to wit, The City of New Orleans, one of the defendants to this bill of complaint, and consequently this said defendant confesseth that she stands in the place and stead of the said ancient corporation, as also the intermediary one, and is bound by the obligations of both, and is entitled to all and singular the rights in law and equity, of both of said superceded corporations, and she avers that the said acquisition of said property from said Blanc was made in good faith and for a valuable and adequate consideration, without any knowledge, information, or belief of or touching any claim of said complainant to said ground or any part thereof; that said purchase was long previous to the filing of the bill to which the complainant and her then husband made the said Municipality Number One a party.

That this defendant avers, for further answer and defence, that Daniel Clark died seized of said property aforesaid; before that, his
137 death, to wit, on the 20th of May, 1811, said Daniel Clark made his last will and testament in due form of law, whereby he donated, gave, and bequeathed to his mother his entire estate, real, personal, and mixed, to wit, to Mary Clark; that after the death of said Daniel Clark, in August, 1813, the said will was duly and lawfully probated in the court of probates, in the parish of Orleans, and State of Louisiana, where the deceased was domiciliated at the period of his death; that Mary Clark, having heard of the death of her said son, and of his will, and its having been probated and ordered to be executed, did, in the month of October, 1813, make her power of attorney in writing in due form of law, appointing Beverley Chew and Richard Relf her attorneys-in-fact, to take possession of the entire property so left to her by her said son, Daniel Clark, and the same to manage and sell from time to time, as they might think right and for her inter-
138 ests; that said Mary Clark thus accepted the succession of her said son, Daniel Clark, absolutely; and, by operation of law, the said acceptance had the effect of vesting in said Mary Clark the entire and absolute title which he, the said Daniel Clark, had in and to any and all property whereof he died possessed, of what nature or kind soever, real, personal, or mixed, and wheresoever the same may have been situated; that said acceptance reverted back to the day of the death of Daniel Clark, and she, the said Mary Clark, became the absolute owner of all property previously owned by said Daniel Clark, as the said Daniel had left the same on the day of his death, and by force of law she also became, in like manner, bound for the debts of her said son, Daniel Clark, such as he owed at the time of his death; that said Mary Clark, being thus the absolute owner of all of the property belonging to the succession of Daniel Clark, and so recognized
139 on the public records of the country, had a right to sell, as she did sell, in manner and form as aforesaid, the property in her bill described as in possession of this defendant The City of New Orleans, unto him the said E. Blanc; and the said Blanc had a right to sell, as he did sell, the same property as hereinbefore described, to this said defendant The City of New Orleans, and all of which this defendant answers as matters of defence herein on her own behalf.

And the said defendant The City of New Orleans, further saith that she hath fully set forth the titles by which she acquired the property as aforesaid; that she does not now own or claim said property, or any part thereof, except that which hath long since been dedicated to "public use" in the form chiefly of public streets, and all which she, the said

defendant The City of New Orleans, will more specially set forth in her answers to the interregatories annexed to the complainant's bill of complaint.

140 And now the defendant Dominique Lanata, for his separate answer in this behalf to all and singular that part and all parts of said complainant's bill of complaint, which charge or charges this defendant to be in possession of certain pieces or lots of ground, situated in the city of New Orleans, and as having belonged to Daniel Clark at the time at the time of the death of him, the said Clark, this defendant, by protestation, &c., not admitting, &c., but denying, &c., saith that he is in possession and claims to be the owner, by lawful title, in fee-simple, a certain piece, parcel, or lot of ground, but not such as is described by complainant in her bill of complaint, as derived from Daniel Clark, he disclaiming any title thereto as derived from said Clark.

And for further answer in this behalf, by protestation, &c., not confessing, &c., but denying, &c., the said defendant Dominique Lanata saith that, in the year 1800, or 1801, the Spanish government being the then sovereigns of the country, and the owners of the square of

141 ground bounded by Burgundy, Rampart, Toulouse, and St. Peter streets, caused a plan thereof to be made by the then surveyor general, Don Carlos L. Trudeau, and by which plan the said square was sub-divided into twelve lots.

1. That at said Spanish government sale, D. Hilaire Boutte became the purchaser of lot No. 4 on said plan, and which said lot was sixty feet front on Burgundy, by one hundred and twenty feet, all French measure, between parallel lines; that said lot, therefore, was composed of a greater quantity than that owned and claimed by this defendant, but embraced it, that is to say, the lot owned and claimed by this defendant is composed of a part of said lot No. 4 on the plan of said Trudeau.

2. That said Boutté, being thus the owner of said lot No. 4, did continue to be the owner until the period of his death, and it descended to his succession. That it was subsequently sold as a part of the assets of the estate of said Boutté, at public auction, by Patten & Mossey, public auctioners; and also by virtue of a judgment in the suit of

142 the executors of D. Hilaire Boutte vs. Pierre Seuzeneau in the then parish court of the parish and city of New Orleans, signed on 27th day of January, 1813.

3. That at the sale by the succession of Boutté, Mr. Pierre Seuzeneau became the purchaser.

4. That Seuzeneau held the same during his lifetime, and the heirs of him, (the said Seuzeneau,) sold the said property to Francois Xavier Freyd, by act passed before Hugh Lavergne, then a notary public, dated January 7, 1822.

5. That the said Francois Xavier Freyd, being the owner of said property, by an act dated the 8th of October, 1830, passed before Carlyle Pollock, notary public, did sell and convey a portion of said lot so owned and acquired by him, unto Marie Josephine Freyd.

6. That, as to the remaining part of said property so owned and held by him, the said F. X. Freyd, and not sold by him to Marie Josephine Freyd, he, the said F. X. Freyd, did continue the owner thereof until his death, and left it as part of his succession; and having left a last will and testament, which was, subsequently to his death,

143 duly probated, *and* he, the said F. X. Freyd, did, by said will, make and constitute John Baptiste Azereto his sole universal

heir and legatee, and thus he, the said Azereto, became the owner of the part of said lot of which said F. X. Freyd died possessed.

7. That said Azereto, being thus the owner of a portion of said lot, did, by an act passed before L. T. Caire, then a notary public, dated the 23d of January, 1834, sell the same unto Joseph Guzman Domingon.

8. That Joseph Guzman Domingon, being thus in possession of the paper-title to said portion of the said lot, and the apparent owner, had a suit instituted against him in the then parish court in and for the parish of Orleans by Hilarie J. Domingon, to be declared the owner of said title, and in said suit there was subsequently, to wit, on the 25th day of February, 1837, a judgment given in said suit, decreeing the said Hilarie J. Domingon to be the true and lawful owner of that part of said lot, so as aforesaid sold by Azereto to Joseph Guzman Domingon.

9. That Hiliare J. Domingon, by act passed before T. Seghers,
144 late a notary public, dated the 2d of March, 1837, sold and conveyed the portion of said lot so held and owned by him unto Réné Salaun.

10. That Maria Josephine Freyd, by act passed before said then notary public T. Seghers, dated on the 4th day of February, 1837, did sell all and singular that portion of said lot so as aforesaid purchased from Francois Xavier Freyd unto him the said Réné Salaun.

11. That the said Réné Salaun, being thus the owner of the whole of that portion of lot number 4, on the Trudeau plan aforesaid, which is now claimed by this defendant Dominique Lanata, did sell and convey unto him, the said defendant, the portion of ground as aforesaid firstly described by him, to wit, by act passed before T. Seghers, then a notary public in the city of New Orleans, dated 28th of March, 1838, and a duly certified copy of which is herewith presented as part hereof, and made Exhibit D. L., No. 1.

And said defendant furthermore saith, his said act of purchase,
145 as also all other conveyances of the said ground so claimed by him as aforesaid, which are dated subsequent to the creation of the office of conveyances, have each and all been duly recorded in said office of conveyance. And this defendant, for his other and separate answer to said bill of complaint and to all and singular those parts which charge that the said Daniel Clark died seized as the owner of the hereinbefore described property claimed by this defendant, he, the said defendant D. Lanata, distinctly denies the same, and avers that said Daniel Clark, at no period of his life, so far as known to this defendant, ever owned said lot of ground, or any part thereof. And said defendant files herewith the act of sale aforesaid from Marie Josephine Freyd to Réné Salaun, marked as Exhibit D. L., No. 2; also the sale from H. J. Domingon to said Réné Salaun as Exhibit D. L., No. 3.

And now these three said defendants, for other and further
146 answer to the bill of complaint of said complainant, and to all and singular those parts thereof which charge that Richard Relf and Beverley Chew did not, and that neither of them did, act legally in their capacity of executors of the will of Daniel Clark, dated in 1811, and attorneys of the said Mary Clark, and which charges that neither said Beverley Chew or Richard Relf, or either of them, when acting in both of, or either of, said capacities, observe or complied with the formalities, or adopt the measures prescribed by law, to give any validity or authority to any act or acts done or assumed to be done by them in said capacities of executors or attorneys in relation to said estate of said Daniel Clark, these defendants, by protestation, and as a matter of

defence to all such and such like allegations in said bill of complaint, say that they ought not to be held to answer the same, for they are in no way or manner liable or bound to answer for the acts of com-
147 mission or omission of the said Chew and Relf, or either of them, further than themselves participated or was a party to their respective acts and doings of and concerning the sale and conveyance of the property named in the bill of complaint of the said complainant; and in so far as said acts are concerned, these defendants say that they distinctly deny that any of the acts and doings of the said Relf and Chew, or either of them, were in any manner unlawful; that they do not admit, but, on the contrary, expressly deny, that any of their acts in that behalf were not in strict conformity to the requisition of the law; and they aver that if any formality directed by law in either of the purchases hereinbefore stated to have been made by these defendants of the property named in the bill was not observed, that the same was, in some unimportant particular, in no manner or form affecting the just, equitable, and lawful title which defendants thereby obtained to said property, inasmuch as they gave and truly and actually paid a
148 full and adequate price therefor, in manner and form as stated, and that they took possession of said property at the time; and that the said Chew and Relf, jointly and severally, being, at and before the date of the said purchase by defendants, in their capacities as executors of the will of Daniel Clark and agents of said Mary Clark, and the apparent owners, as such, thereof, had a right in law to sell the same for a fair price, and to deliver the same, which they did; and that such doings as were done in and about the transactions of purchase aforesaid, were all so done by them and on their behalf in perfect good faith, without the most remote knowledge, information, or belief, then, since, or now that they had not perfect and lawful right to do exactly what was done; that the said Mary Clark being the instituted heir, his universal legatee, his forced heir, and then and there present and accepting the said succession, taking possession thereof, had full and
149 lawful power to sell to these defendants, in manner and form as she did. Wherefore they put forth the said several acts of purchase as an ample and sufficient defence to the complaint in said bill of the complainant stated.

And the said defendants also here insist as further and other matter of answer and defence herein to this part of said bill of complaint, that they, the defendants, should not be held to answer herein more fully and specifically than they have answered already, because, they say, the complainant hath herein wholly failed to specify, or in any manner set forth, in what particulars or wherein the said Richard Relf and Beverley Chew, or either of them, when acting as executors of Daniel Clark, or as the agent or agents of Mrs. Mary Clark, failed or neglected to comply with the formalities of the law, and they say that the said complainant should not be allowed any advantage herein by reason of her uncertain, indefinite, and irregular mode of complaining against acts, until she shall have specifically pointed out what law has been violated,
150 what formality has been overlooked, or what requisition has been disregarded.

And said defendants, for further answer to the said same parts of said bill of complaint, saith that it is unjust and unreasonable that they should be held to answer for the alleged acts of omission of Richard Relf and Beverley Chew, in not having, as is alleged by complainant, but not admitted by these defendants, but, on the contrary, particularly denied, taken a faithful inventory and a just appraisement of the real

and personal estate of Daniel Clark; and these defendants expressly deny that there is any such law or laws in Louisiana, or that there ever was, and they might add their belief that there never will be, requiring a purchaser of property in good faith, for a valuable consideration actually paid to persons in the actual possession and control of property derived from a succession, to show that said property hath been formally inventoried and appraised; but, on the contrary, these de-
151 fendants aver that the heir of a deceased person may sell and convey property, giving a perfect title thereto, without any inventory or appraisement whatever, and they expressly aver that neither one or the other is requisite to the validity of a title; but they say that, by the laws of Louisiana, which they set up here as their answer and defence, an heir, whether at law, or an heir instituted by will, is under no obligation whatever to follow any form or mode whatever, except such as will rule and control the contracts of persons in esse, and whether or not the forms and requisites of the law were observed in this behalf, they deny that any person whatever can complain of the same, except Mary Clark, the heir of said Daniel Clark, or her lawful representatives.

And said defendants, by protestation, &c., for further answer to said bill of complaint in the same behalf, say that they deny that their contracts of purchase whereby they purchased the property named
152 in said bill of complaint were made by private contract, and not by public sale, as charged; and, furthermore, they say that they had a right to purchase, by contract, from said Mary Clark, through her agents, as they did; that said Mary Clark, being at the time of full age, had a right to sell the said property, without appraisement, without notice, and without a public sale; that her acts of sale cannot be called in question until her lawful heirs or legal representatives are made parties to this suit.

And for other and further answer to said parts of said bill of complaint as charges that the purchase of the property in the bill described were made for less than a full and valuable consideration, they deny the same, and aver that the reverse of said allegation is the real truth. And as to the averment in said bill of complaint that Beverly Chew and Richard Relf, nor either of them, had caused themselves to be duly recognized by a court of competent authority as attorney or attorneys of said Mary Clark, these defendants deny that there then was,
153 is, or ever hath been any law by which a duly-appointed agent was bound to have himself recognized by any court of law in Louisiana, in order to give validity and binding force to his acts as such, if otherwise he was duly and in fact empowered; and they deny that said complainant hath any right to put forth any such statements as complaint of wrong done to her, when she hath neither shown or averred any interest whatever derived from the fact that Mary Clark hath not been lawfully represented. Equally incompetent is it for the complainant to set forth and charge, as she hath done in her bill of complaint, as cause of injury to her, that the said power of attorney from Mary Clark to Relf and Chew was vague and general in its terms, and did not expressly authorize them, or either of them, to sell the property aforesaid. And defendants insist, by way of answer in this behalf, to the incompetency of complainant to make such charges;
154 and for further answer in the same behalf, by protestation, &c., they deny the truth of all such like statements in said bill of complaint, and aver that the contrary is the real truth of the case.

And the said defendants, by protestation, &c., for other and further

answer to that part, and all such like parts of the bill of complaint which charges that the acts of sale from Richard Relf and Beverly Chew of said properties to these defendants "were, on the face of the proceedings, illegal, informal, fraudulent, and void by the laws of the State of Louisiana, and that so they were necessarily known to these defendants at the time of their purchase of said properties," these defendants say that said charges, and all like charges, in said bill of complaint, whether made directly, as in said part now being directly answered, or insiduously, as in other parts of said bill of complaint, and whether made directly or indirectly, are not only false in form, but knowingly and designedly false, that is to say, the said complain-
155 ant hath, after many years of examination made her said statement, and hath no excuse for the same, such as that she hath been informed, and she believed, but knowing the truth to be otherwise than as stated in her said bill of complaint, knowing, as she does, that these defendants have never wronged her of anything whatsoever, of value or no value, she hath made the said charge of fraud against them, which they now distinctly, and in every form which can be given to it, emphatically and indignantly deny, and aver that there is neither truth nor semblance of truth in said charge.

And for other and further answer, by protestation, &c., to all and singular that part of the bill of complainant which charges that these defendants "knew that the pretended will of 1811 had been revoked by said Daniel Clark, and was of no validity, and that the making and existence of said last will of said Daniel Clark of 1813 were well known to these defendants at the time of said pretended purchase of
156 said pieces of ground from said Relf and Chew," and to all and such like charges these said defendants say that they specially deny, by way of answer, all and singular such charges; and for other and further answer thereto, they say that though said charges are put forth in said bill of complaint in vague, loose, and uncertain terms, yet they do not deny that they understand the objects, intents, and scope thereof; and, therefore, they say that, passing by the illogical language in which they are charged with having known of the revocation of a pretended will, made by Daniel Clark in 1811, they say that the truth and circumstance of the case in reference, not to a pretended, but to a real and actual will made by the late Daniel Clark, are that, during his lifetime, Daniel Clark made a will, dated on the 20th of May, 1811; that, during the lifetime of said Daniel Clark, he, the said Daniel Clark, made statements to a number of his friends, which made impressions upon their minds to the effect that he, the said Daniel
157 Clark, had, or was about to make a will, which, if it had been made about the time when said declarations were made, would have made it, probably, posterior in date to the will which he in truth did make, dated May 20, 1811; that, among other friends, the said Daniel Clark did, as these defendants are informed and believe, apply to and converse with his friend Francois Dusuan de la Croix of and respecting his, the said Daniel's, intention of making a will; that such conversations on the part of said Daniel Clark were of such a nature as to induce said De la Croix to believe that Daniel Clark had made a will of a date within one or two years previous to his death; that said impression was so decided upon the mind of said De la Croix that, after the death of said Daniel Clark, in August, 1813, and the will of him, the said Daniel Clark, made as aforesaid in May, 1811, had been presented for probate, and before any judicial action
158 had been taken upon said will, or the probate thereof, he,

the said De la Croix, filed an opposition in the court of probates of the parish of Orleans, where the application for the probate of said will of 1811 was then pending, and opposed the probate thereof until there could be time and opportunity secured for full search and examination into the fact whether, in truth, the said Daniel Clark had made a subsequent will to the one just referred to; that said De la Croix did accordingly make and file his opposition, and did make and cause to be made the most ample enquiries, judicial and extra-judicial, on the subject, the result of all which was that no other will of the said Daniel Clark could be found or shown to exist than the one of May 20, 1811; and thereupon the opposition of said De la Croix to the probate of said will of Daniel Clark of the date last aforesaid was rejected, and the probate of said will was duly and lawfully ordered.

And these defendants furthermore distinctly state, in answer
159 to said parts of said bill of complaint aforesaid, that the opposition which said De la Croix made to the probate of the will of Daniel Clark, dated in May, 1811, was made from no suspicion on his part, as these defendants have been informed and believe, upon any belief or suspicion that the said will of said Daniel Clark, dated May 20, 1811, was not a true and genuine will, or that it was, as charged in the said bill of complaint, a "pretended will," (for, in truth, the said De la Croix then knew, as he knows now, that the same was a real and genuine will;) that it was, beyond all question, written entirely by said Daniel Clark, and dated and signed by him; nor was his said opposition placed upon the ground or suspicion on his part entertained that any person whatsoever, who was asking for the probate of said will of said Daniel Clark, dated May 20, 1811, knew that said will had
160 been in any manner changed, abolished, or revoked, but his opposition was based upon his own personal conviction then entertained that it was probable that a subsequent will to the one aforesaid had been made by said Clark; that, in course of his investigations into the matter at the time, he learned that said Daniel Clark had made similar statements to other persons as those he had made to him respecting his will; and such facts, coupled with others which he was made acquainted with at the time of his said investigations, convinced him, the said De la Croix, that said Daniel Clark had either never made any subsequent will to the one of 20th May, 1811, or if he had made it, he had himself revoked or destroyed it; and, being thus and then convinced, the said De la Croix cheerfully acquiesced in the probate of said will of said Daniel Clark, of 20th May, 1811.

And, furthermore, by protestation, &c., for further and other answer to said part of said bill of complaint which charges these de-
161 fendants with knowledge of the existence of a last will and testament made by said Daniel Clark in 1813, such as is stated and set forth in the bill of complaint, these defendants say that they utterly and distinctly deny any and all such charges and aver that they never had any such knowledge or belief whatsoever, but, on the contrary, their convictions then were and are now that, if in truth said Daniel Clark ever did make any such subsequent will to the one of 1811, the contents thereof were very different from this one now attempted to be imposed upon the courts of the country as having been made in 1813, and in fact they cannot believe that Daniel Clark would ever have presumed to make such a will as it is charged he did.

And these said defendants further say that, in 1813, when said Daniel Clark died, and at the time said De la Croix was making opposition

to the probate of the will of Daniel Clark, dated 20th May, 1811,
162 the self-same persons, by whom it is now pretended to show the existence and contents of the will of Daniel Clark, made in 1813, as stated in the bill of complaint, were all then here; their knowledge was, of course, fresher and better than when they testified; no bad feelings had supervened; no clashing interests had grown into existence; every one of the surviving intimate friends of Daniel Clark was here; his particular and very intimate friend Judge Pitot was not only alive and here, but was presiding alone in the very court which had exclusive jurisdiction to order the probate of wills, and yet there was found no one then to give a particle of evidence, information, or testimony on the subject. The said parties were all personally known to said De la Croix, and not one them ever gave him any information on the subject; and one of the alleged executors of said alleged will of 1813 actually pronounced in effect against its existence by ordering the probate and execution of the will of May 20, 1811, in his high judicial capacity.

163 And for other and further answer in this behalf, by protestation, &c., the said defendants say that other than they have herein stated of and concerning the said supposed will of Daniel Clark, dated at a subseqnent period to that of 20th May, 1811, they, said defendants, had no information, knowledge, or belief whatsoever, as so far from the same having in any other way or manner whatsoever been known, or, as charged in said bill of complaint, "necessarily known by them" at the time of the purchase of said properties, they, the said defendants, say that, so far from said allegation in said bill of complaint being true, the very reverse was true; that the court of probates aforesaid had pronounced and ordered the execution of said will.

The mother of the deceased, a very respectable lady, had accepted the succession of her said son, Daniel Clark; she, the said Mary
164 Clark, had duly appointed Messrs. Relf and Chew aforesaid her attorneys in fact to take possession of said estate; they had so taken possession; those two gentlemen were those who, before his death, in a pre-eminent degree, enjoyed the entire confidence of the deceased, Daniel Clark; they were his partners before and at the time of his death; they were engaged with him in heavy commercial enterprizes; but he had named them in his olographic will, written by himself, as his executors; they were both then in absolute and unqualified possession of the public confidence; that confidence Beverly Chew enjoyed up to the hour of his own death, nearly forty years thereafter, while the same confidence hath been continued to Richard Relf up to the present period of time; and these defendants, having entire confidence in both, had no reason to believe then and did not believe that there was anything wrong whatsoever with regard to either of them respecting their administration of the estate of Daniel Clark or their agency for the mother and heir of said Daniel Clark.

165 And the said defendants, for other and further answer to said bill of complaint, by protestation, &c., or to so much as charges that the said complainant became of age on the 31st December, 1827, these defendants answering, say that, to the best of their information and belief, and they so answer as part of their defence to the said bill, that she was born in the month of June, 1803, and consequently arrived at the age of majority in the month of June, 1824.

And said defendants, for other and further answer to said bill of complaint, or so much thereof as charges that complainant with her then husband, W. W. Whitney, did institute a suit in the probate court of

New Orleans on the 18th of June, 1834, for the puryose of proving in said court an alleged will said by her to have been made by Daniel Clark in the month of July, 1813, say that they admit that
166 such a suit was then instituted as charged; but they furthermore say that said suit had also another object, to wit: to revoke and call in the aforesaid and recited probate of the will of Daniel Clark, dated 20th of May, 1811; that, moreover, in her said suit she made parties with whom, and contradictorily with whom, as they are advised, informed, and believes, she undertook to litigate and contest seriously the issues presented in her then said suit; that issue was joined upon her allegations, after she had taken considerable testimony, but which was never presented to or received by the court in said cause; and, after the case had been pending for nearly two years, the same was, it is true, dismissed, but not as now stated by complainant in her bill of complaint, "without any fault" of complaint; but said defendants answer and say, as a part of their defence to this said bill of complaint herein, that said suit was dismissed by the fault and the sole and exclusive fault
167 of said complainant and her then husband, W. W. Whitney, inasmuch as, though present in court, with their counsel, they refused to proceed, and allowed themselves to be called, and, having refused further to prosecute their said case, *and* therefore and thereupon the same was dismissed.

And the said defendants, for further and other answer to so much of the said bill of complaint as charges that the complainant, on the 28th of July, 1836, instituted a suit in the district court of the United States for the eastern district of Louisiana, and in which it is charged that it was "to set up the will of 1813, and to enforce her rights under the same, and as heir-at-law, by bill in chancery against these defendants with others, for said properties, and other property; that the Supreme Court of the United States, in 1844, held that the will of 1813 should be proved in the probate court of the State before any title to property could be set up under it; and her claim was finally decided against
168 her in April, 1852." These defendants say that true it is that such a suit as complainant refers to in her present bill, was instituted by her and her then husband, W. W. Whitney; that, while said suit was pending, an act of Congress was passed by which circuit system was extended to the eastern district of Louisiana, and said case was then, or subsequently, transferred into this court, being then the circuit court of the United States for the ninth circuit and eastern district of Louisiana, and it became number 122 on the docket of this honorable court; that true it is that, in the year 1844, the Supreme Court of the United States decided that the complainant could not set up title under the alleged will of Daniel Clark of 1813, until the same should have been duly probated in the probate court of the State; but these defendants, answering further, and by way of defence to the present bill of complaint aver, set forth, and declare the truth to be that the said Supreme Court of the United States did not, in conse-
169 quence of their said decision either then dismiss so much of the complainant's claim as set up title to property under said alleged will of Daniel Clark, made in 1813; nor did they direct this honorable court so to do; nor did they direct the complainants in said bill so to reform or amend the same as to dismiss from further cognizance in said cause, the claim of the complainant as was stated to arise under the said alleged will of Daniel Clark, made in 1813; but, on the contrary, the said Supreme Court expressly caused this honorable court to hold on to the whole cause as it stood in said original bill, in order

to enable the complainant in said cause to compel an answer full and true, and discovery as to the said alleged will of 1813. Which said answers so to be made under oath, by the defendants therein, the said Supreme Court did declare, might then be used, and the defend-
170 ants obliged to consent to go into the said court of probates, and there have said alleged will established contradictorily with them.

And answering herein furthermore, the said defendants say, that when said opinion and answer, with others, to which they refer as part hereof, came down to the said circuit court, to wit, this honorable court, the said complainant did not, in her said suit in chancery, amend her bill by discontinuing that part and portions which sought to set up said alleged will of Daniel Clark, made in 1813, and her alleged rights under the same; nor did she so reform the same in conformity to the suggestions of the Supreme Court, so as to convert it into a bill of discovery to obtain the answers of the defendants therein, to be used in a further controversy with them in the probate court, in a proceeding to establish there the said alleged will of 1813; but, on the contrary, she refused so to amend or reform her said bill, and refused to dismiss
171 all such parts thereof as referred to, and set up claim to property under said alleged will of 1813, and persisted in keeping said bill as it originally stood, and endeavored by amendments and supplements to give what was therein alleged to be an equitable reason why she should and would not proceed as suggested, and she did in fact hold on to her said original bill; that the cause was kept pending for many years, and was dismissed at rules for want of prosecution; that several unimportant changes took place in the form and shape of said bill; that during its pending, the then husband of plaintiff, W. W. Whitney, departed this life; that she subsequently intermarried with Gen. E. P. Gaines, and he having been joined in said suit as a co-complainant, and while in that condition the complainants therein obtained an order from this honorable court to set aside the order dismissing the case at rule for want of prosecution; and thereupon afterwards, to wit, on or about the day of December, 1848, the complainants in said
172 cause as it then stood, Edmund P. Gaines and his wife, the complainant in the present bill of complaint, did then and there file in this honorable court in said cause, an amended and supplemental bill of complaint, and among other things, did sever the original bill into several parts, and caused their proceedings as against these defendants to be placed upon the docket of this court as a separate and distinct proceeding, and caused it to be numbered as a case standing on the equity side of this honorable court, and number on the docket.

And these defendants now refer to the said cause, and, answering, show that Richard Relf, Beverly Chew, and these defendants were defendants made to said amended and supplemental bill; that, as will be seen by inspection thereof, the whole scope, end, and purpose was to claim of these defendants, as defendants therein, the very and identical property, the increase, rent, and produce, as is now set up in her
173 present bill of complaint against these defendants; that, among other things, it was set forth in said supplemental and amended bill that—

"It is expressly charged that, previous to the death of said Daniel Clark, it had long been his intention and earnest desire of the said Daniel Clark, the father of your oratrix, to leave at his decease, all his property and estate, real and personal, to your oratrix, the said Myra Clark; that, in order the more effectually to secure the fulfillment of said intention

and desire, the said Daniel Clark did, in or about the month of July, in the year 1813, duly make and execute his last will and testament, according to law, having wholly written and signed the same with his own hand, and did, in and by the said will, declare your oratrix the said Myra Clark, to be his legitimate child; and the said Daniel Clark did also in and by his said last will devise and bequeath to your oratrix, the said Myra Clark, all his, the said Daniel Clark's, property and estate real and personal, and did name therein as the executors of said
174 will, Colonel Joseph Deville Degaqtin Bellechasse, James Petit, Chevalier Dusuan de la Croix, appointing the said Chevalier de la Croix tutor also of your oratrix, the said Myra Clark, your oratrix being then an infant under the age of twenty-one years, to wit, of the age of seven years; and that the said will did also contain some bequests to friends, amongst which bequests were a legacy or annuity of two thousand dollars per annum, to be paid to Mary Clark, the mother of said Daniel Clark, during the lifetime of said Mary Clark, an annuity of five hundred dollars to be paid yearly to one Caroline de Grange until the said Caroline should have attained her majority, when the annuity should cease and the sum of dollars should be paid to her, and also a bequest of thousand dollars to be paid to the son of the said Judge James Pitot; and the said will further contained spe-
175 cific and detailed instructions respecting the education of your oratrix, the said Myra, and the management of the estate and property of the said Daniel Clark during the infancy of your oratrix.

"And it is expressly charged that the said will was wholly written and signed with the proper hand of the said Daniel Clark; that the said will was shown by the said Daniel Clark to, and its contents read by, the said Judge James Pitot, the late John Lynd, notary public, in and for the parish and city of New Orleans; Mrs. Harriet Smith, and others; and that the said will was also shown, and its contents communicated by the said Daniel Clark to the said Colonel Bellechasse, Chevalier de la Croix, M. Pierre Baron Boisfontaine, and others; and that the said Daniel Clark departed this life, on or about the 16th day of August, in the year of 1813, without altering or revoking his said will, and leaving your oratrix, the said Myra Clark, his only child or descendant
176 and the forced or instituted heiress of all his property or estates, real and personal.

"And it is expressly charged that the said Daniel Clark left, at his decease, no child or descendant, him surviving, except your oratrix, the said Myra Clark; and that your oratrix, the said Myra Clark, was the lawful and legitimate and only child or descendant of the said Daniel Clark, and entitled as such by the law of the land to the possession and inheritance of all the property and estate of the said Daniel Clark, and especially to the property, and estate, and slaves hereinbefore enumerated and described.

"And it is expressly charged that your oratrix, the said Myra Clark, soon after her birth, which took place in the month of July, 1806, was placed by her father, the said Daniel Clark, in the family of Samuel B. Davis, with whom she continued to live at New Orleans until the year 1812, when the said Samuel B. Davis removed, to live, to the city of Philadelphia, in the State of Pennsylvania; that your oratrix,
177 the said Myra , accompanied the family of the said Samuel B. Davis to Philadelphia, and remained in his, the said Samuel B. Davis', family until the time of the death of the said Daniel Clark, and afterwards; and that, during the lifetime of the said Daniel Clark,

he, the said Daniel Clark, continued to exercise the authority, care, and protection of a parent in regard to your oratrix, the said Myra Clark.

"And that, in or about the month of May, in the year 1811, the said Daniel Clark was led to believe that one Daniel W. Cox, of Philadelphia, with whom he had previously had some connection in business, had, by imprudence or misconduct, involved him, the said Daniel Clark, in some pecuniary and commercial difficulties and embarassments; that immediately thereupon the said Daniel Clark deemed it advisable to proceed forthwith to Philadelphia in order to attend personally to the settlement of the difficulties which it was represented to him
178 existed; that, preparatory to his undertaking the voyage from New Orleans to Philadelphia, for the purposes aforesaid, and in or about the month of May, 1811, he, the said Daniel Clark, conveyed property to Samuel B. Davis, and others, to the amount of several hundred thousand dollars, to be held in trust by them for your oratrix, and then, at or about the said time, there made a will, devising briefly and in general terms his property to his mother, Mary Clark, then residing out of the State of Louisiana, and also appointing Richard Relf and Beverley Chew, two of the defendants herein, the executors thereof. And that the said Daniel Clark, in or about the said month of July, 1811, proceeded to Philadelphia, and returned again in a few months thereafter, and in the same year, to New Orleans; that the said Daniel Clark had ascertained, at Philadelphia, upon his having proceeded thither as aforesaid, that his interests had not been so seriously jeopardized by the said Daniel W. Coxe, as he had been led to believe,
179 as above stated, previous to his having gone there; that he did, therefore, upon his said return to New Orleans, receive back some portions of the property, which he had conveyed as aforesaid in trust for your oratrix, the said Myra, under the above-mentioned erroneous belief respecting the supposed difficulties in which the said Coxe was alleged to have involved him; and that, upon his said return to New Orleans, and upon his having ascertained as aforesaid the groundlessness of the apprehension which had been excited in his mind relative to the consequences that might result to himself from the transactions of the said Daniel W. Coxe, he, the said Daniel Clark, did also declare that he no longer intended that the said will made in 1811 should be his last will; that he had made it while laboring under false impressions, and only provisionally, that he should revoke the said will of 1811, and make and execute another will, devising and bequeathing
180 all his estate, real and personal, to your oratrix, the said Myra Clark; and it is expressly charged that the said Daniel Clark did revoke the said will made in 1811 as aforesaid, and did, after the making and execution of the said will of 1811, duly revoke and execute, in the year 1813, and but a short time before his death, as your oratrix has hereinbefore set forth, his, the said Daniel Clark's, last will and testament, devising and bequeathing thereby to your oratrix, the said Myra Clark, all of the real and personal estate of him, the said Daniel Clark, and declaring your oratrix, the said Myra, to be the legitimate child of him, the said Daniel Clark, as your oratrix has hereinbefore more particularly stated; and that the said Daniel Clark did, upon his deathbed, and unto the very moment of his decease, continue to declare that the aforesaid will made by him in the year 1813, devising all his property as aforesaid to your oratrix, the said Myra, was his last will
181 and testament, and was then contained in a black case in his office-room in his house, in which he was at the time, and in which

he died almost at the moment of making the said declarations in favor of your oratrix, the said Myra.

"And that the said Daniel Clark, upon making the said will of 1811, delivered it to the said Richard Relf and Beverley Chew, or one of them, and allowed it to remain in their keeping from thenceforth; that the said Daniel Clark was very extensively engaged in mercantile and other business, and speculations, and possessed a vast amount of property, and that the said Richard Relf acted as his agent in relation to many of the transactions and affairs in which he, the said Daniel Clark, was engaged; at and immediately before the time of the death of the said Daniel Clark, the said Richard Relf assumed to direct the domestic arrangements of the said Daniel Clark and attended during the last illness of the said Daniel Clark at his, the said Daniel Clark's,
182 dwelling-house, and took upon himself the sole control of the household and affairs of the said Daniel Clark, and that instantly upon the death of the said Daniel Clark, all the books, papers, letters, documents, and all deeds, and writings of what nature soever belonging to the said Daniel Clark, came into the sole possession of him, the said Richard Relf.

"And it is expressly charged that the said will of 1813 made by the said Daniel Clark in favor of said Myra, came into the possession of the said Richard Relf immediately upon the death of said Daniel Clark, & that the said Richard Relf fraudulently concealed, suppressed, or destroyed the same, or caused it to be concealed, suppressed, or destroyed, and did substitute, in its place or stead, the said old revoked will of 1811, in which he, the said Richard Relf, was named an executor; and that said last will of 1813 was never seen by any one after the death of the said Daniel Clark, except by the said Richard Relf, and Beverley Chew, and their confederates.

183 "And it is expressly charged that the said Richard Relf did fraudulently cause the said old revoked will made in 1811 to be admitted to probate in the probate court for the parish and city of New Orleans, and procured himself, the said Richard Relf, to be sworn and authorized by the said probate court as the testamentary executor of the said Daniel Clark."

And again: In said amended and supplemental bill it is stated and charged in substance as follows, to wit:

"And your orator and oratrix further show that the said defendants, Richard Relf and Beverley Chew, and several other defendants in said original bill being duly served with process, appeared to the said bill of your orator and oratrix and filed demurrers thereto, which said demurrers were argued on appeal in the Supreme Court of the United States and were overruled in said court, and defendants were required to answer to said bill of complaint. And that the said court directed the said bill of complaint to be amended in two points, which
184 were made by said demurrers, that is to say, the said Relf and Chew should not be called upon to account in and by said bill, and that in the aspect in which your oratrix was presented to said court in said bill, as the universal instituted heir of said Daniel Clark, under the will of 1813 as aforesaid, she could not make the said Caroline Barnes and her husband parties to said bill as defendants, she, the said Coroline being a legatee in said will of 1813. That in these two points the then soloicitor of your orator and oratrix attempted to amend said bill, but your orator and oratrix charge that the paper filed by their then counsel in 1844, did not accomplish the purpose designed by such an amendment.

"That afterwards the said Relf and Chew and Caroline Barnes and others filed answers to said bill as intended to have been amended, in which they insisted for their defence, in part, upon the matters which should have been avoided by said amendment.

185 "And your orator and oratrix further show unto your honors, that the said defendant Francois Dusan de la Croix, appeared to said bill by P. A. Rost, solicitor and counsellor, in this honorable court.

"And your orator and oratrix further show unto your honors, that to the answers to said Relf and Chew and the others of the defendants who have answered, replications have been filed.

"And your orator and oratrix further show unto your honors, by way of amendment to said bill, that they will renounce, for all the purposes of this suit, against the defendants herein named, all claim which your oratrix has heretofore made to the estate of said Daniel Clark, as his instituted and universal heir and devisee by the said will of 1813, and that she will, as against these defendants herein named, assert and maintain her right, title, and equity to the four-fifths part of the

186 property and rights embraced in this amended bill and supplement, as the forced heir of said Daniel Clark, deceased, within and according to the tenor and effect, meaning and intent of the law of the State of Louisiana, in such case made and provided, in force at the time of the death of said Daniel Clark.

"But your orator and oratrix expressly charge that they shall at all times insist upon the fact that said will of 1813, as stated in said original bill, was made by said Daniel Clark, and was suppressed or destroyed, as also therein stated, so far as anything was in said will contained declaring the legitimacy of your oratrix, as the only child of the said Daniel Clark, born in lawful wedlock with said Zuline Née Carriere, and no further or otherwise, your orator and oratrix being willing and content that the said defendants in this amended bill and supplement, as regards the property herein described should enjoy ac-

187 cording to their respective rights, the other one-fifth or disposable portion of the *portion of the* estate of said Daniel Clark herein embraced. And your orator and oratrix further show and charge, that all the matters herein stated to be contained in the said original bill of complaint are true and will be herein and hereby maintained, except so far as the renunciation by your oratrix of her asserted rights as instituted heiress, as stated in the preceeding paragraph by way of amendment."

And again: In said amended and supplemental bill of complaint, it is charged in substance as follows:

"And your orator and oratrix further show unto your honors, by way of amendment to said original bill, and so charge, the fact is, that the said Francois Dusuan de la Croix, defendant herein, became possessed of the fifty-five slaves first herein mentioned by means of a fraudulent and simulated unlawful and unauthorized act, made before Marc

188 Lafitte, at that time a notary public, duly commissioned and sworn, in and for the city of New Orleans, executed by the said Richard Relf, pretending to act therein both as the testamentary executor of the said Daniel Clark, deceased, and as the attorney-in-fact of the said Mrs. Mary Clark, the instituted universal heir of said Daniel Clark by said will of 1811, of the one part, and the said de la Croix of the other part, which said act bears date of the 11th day of December, 1813, a copy whereof is filed in this cause, and marked in Schedule A,

and which your orator and oratrix pray may be made a part of this their amended and supplemental bill; and your orator and oratrix charge that the said act is wholly void and of no effect and conveyed no right, title, or equity whatsoever to the said de la Croix, in or to said slaves therein named, nor either of them, for this among many other
189 reasons, that the said Relf could not by the law of the State of Louisiana, in such case made and provided, at that period in full force, in his capacity as executor, act with respect to the estate of his testator, in any matter without the concurrence of his co-executor; whilst no cause is apparent for his so doing, and furthermore the said Relf was incompetent lawfully to act at the same time as executor and as the attorney-in-fact of the instituted heir; and further, the said sale being by private act instead of public auction, was unauthorized and unsanctioned by the then law, and is therefore wholly void.

"And your orator and oratrix further show unto your honors, that the said de la Croix became possessed of the said twenty slaves secondly herein named by means of a like act as aforesaid, bearing date the 6th day of October, 1813, before Marc Lafitte aforesaid, an authentic copy of which act is filed in this cause, marked in Schedule B, and which your orator and oratrix pray may be made a part of this their
190 amended and suplemental bill. And your orator and oratrix further charge the fact to be that said act is simulated, fraudulent, unlawful, and wholly void, and gave to and vested in the said de la Croix no property, right, title, or equity, whatsoever, in or to the said slaves therein named, or either of them, for the reasons hereinbefore stated and for matters apparent in said act.

"And your orator and oratrix further show unto your honors, that they are ignorant and uninformed of the means or of the manner through or by which he, the said de la Croix became possessed of the twenty-two slaves lastly herein named, but your orator and oratrix charge that by whatsoever pretence or color of title, the said de la Croix claims to to have acquired property or rights in and to said slaves, such pretence is wholly without foundation in truth or in law or equity, and such title is wholly void and of no effect whatsoever against the rights of your oratrix in the premises.

191 "And your orator and oratrix further show unto your honors, and so charge the fact is, that the said Francois Dusuan de la Croix, at the time of the pretended purchase of the aforesaid slaves, well knew that the said Richard Relf and Beverly Chew, nor either of them, had any right, power, or authority whatsoever so to sell or dispose of the said slaves in the manner as aforesaid; and further, that the said Francois Dusuan de la Croix, at the time of the said purchase, well knew that your oratrix was the only child and heiress-at-law of the said Daniel Clarke, deceased, and that as such heiress your oratrix was not represented in said transactions with said Relf in respect to said slaves so pretended to have been purchased as aforesaid. And your orator and oratrix further charge that the said Francois Dusan de la Croix has had, from the date of the said pretended purchase as aforesaid, the full and entire use and enjoyment of said slaves, with
192 their increase, and that he now possesses them, and all of them now living, and all and singular their increase, and that the present value of said slaves surviving, with the increase of all those so disposed of as herein stated, with the ordinary use or hire of said slaves since they came as aforesaid unlawfully into the possession of the said de la Croix, with the lawful interest thereon, amounts to the sum of four hundred thousand dollars and upwards, four-fifth parts whereof

is justly due to and is hereby claimed by your oratrix as aforesaid in her capacity and relation of forced heir of the said Daniel Clarke, deceased.

"And your orator and oratrix further show unto your honors that the said slaves now living, with all their increase, are now in possession of the said de la Croix, and used and employed upon his plantation in the State of Louisiana, and that the revenue which they do or should produce is not less than twelve thousand dollars to fifteen thousand
193 dollars per annum, as your orator and oratrix are informed and believe, and so charge.

And these defendants, for further answer, by protestation, &c., not admitting, &c., say, and each for himself saith, that, in the year 1836, the complainant, with her then husband, William W. Whitney, filed in this honorable court their original bill, on the equity side of this court, and numbered 122 on the docket of this court, in which, among other things, she did set forth and declare that Daniel Clark, to wit, the same person named in her present bill of complaint, was the father of her, the said complainant; that she was the legitimate child of said Daniel Clark; that said Daniel Clark had been lawfully married to one Zulime Née Carriere, the mother of complainant; that complainant was born within lawful wedlock, alleged by her to have existed between said Daniel Clark and Zulime Née Carriere; that she, the said complainant, was the lawful and forced heir of Daniel Clark; that Daniel Clark
194 had made a will, dated in July, 1813, by which he had declared the legitimacy of her the said complainant and had instituted her his universal heiress, bequeathing to her his entire estate, after a few unimportant particular legacies. That these defendants now refer to said original bill, and herewith file a printed copy thereof as exhibit marked N. O., H. E. L., D. L., No. 1.

That, after said original bill had been filed and a great variety of proceedings had been had therein and thereon, after the complainant therein and herein had filed sundry supplemental and amended bills, she did, with her then husband, E. P. Gaines, file in the said cause several amended bills of complaint, and thereupon divide and separate her said original bill into sundry parts and parcels, and for the purposes of speeding a trial, for matters of convenience and other objects, she, with her therein then co-complainant, did separate her said original bill, and cause the same to be entered and noted on the docket of this
195 honorable court under separate and distinct numbers, to wit, numbers 122, 1728, 1729, 1408, 1731, 1784, 1785, 1408, 1729, 1820, and perhaps others not remembered at this time by these defendants; but all of which several cases so numbered were in truth and fact part and parcel of the said original cause number 122; that by agreements between complainants and defendants all testimony in one of said causes was used in all of the others; that said causes were to be tried together, in fact, in the same issues, exhibits, and testimony; that, among the said amended bills aforesaid, there was one filed in the month of July, 1848; and that therein the complainant herein did set forth and charge, among other things, in substance as follows:

"And your orator and oratrix further show unto your honors that, on or about the eighteenth day of June, one thousand eight hundred and thirty-four, your oratrix, aided and assisted by her then husband, William Wallace Whitney, filed a petition in the then court of
196 probates of the parish of Orleans, praying that said will of said Daniel Clark, bearing date in 1811, which had been fraudulently set up and probated by said Relf and Chew be annulled and set aside

and held for naught, and that the said last will of said Clark, bearing date in 1813 as aforesaid, should be established, and your oratrix have the full benefit and advantage thereof, notwithstanding its destruction as aforesaid by said Relf. That, owing to the fact that said Relf and Chew had the possession, custody, and control of all and singular the books and papers of the said Daniel Clark, deceased, and their refusal to allow your oratrix, her counsel, or any one in her behalf, to have access to the same, or any part or portion of them; and that said Relf and Chew had in their hands or under their control the vast estate of the said Daniel Clark, which legitimately belonged to your oratrix as aforesaid, affording to them ample means to oppose your oratrix, which, as your orator
197 and oratrix believe, they used in such manner as to cause your oratrix to despair of success in the prosecution of her just rights, as aforesaid, without the aid and interposition of this honorable court, which your oratrix, with her then husband, the said William Wallace Whitney, invoked by a bill of complaint filed on the twenty-sixth day of July, one thousand eight hundred and thirty-six. That in and by said bill of complaint the said Richard Relf and Beverly Chew, with others holding, under them or through their instrumentality, some portions of the estate of said Daniel Clark, justly claimed by your oratrix, were made defendants. That, after filing said bill of complaint the said William Wallace Whitney died; and subsequently your oratrix, having intermarried with your orator, said suit has been since carried on and is now pending in the names of your orator and oratrix as complainants. That, from unavoidable delays and difficulties which your
198 orator and oratrix have been compelled to encounter, their said bill has never been brought to a hearing as to all the defendants; but that one of said defendants, to wit, Charles Patterson, answered to said bill and a hearing was had, and a decree pronounced in this honorable court in favor of your orator and oratrix, and, by which said decree your oratrix was declared and decreed to be the only and legitimate child of the said Daniel Clark, born of a lawful marriage of said Clark with the mother of your oratrix, the said Zulime Née Carriere, and as such legitimate child and heir of said Daniel Clark, deceased, your oratrix to be entitled to the four-fifths parts of the said estate or succession of said Daniel Clark, deceased, both real and personal, situated in the State of Louisiana, as his forced heir, according to the laws of said State in force at the time of the death of said Daniel Clark in such case made and provided. That subsequently said suit was carried before the Supreme Court of the United States at
199 Washington, and by said court the aforesaid decree of this honorable court was in all things affirmed; all of which will more fully and at large appear by reference to the record of said decree and proceedings prior thereto, entitled, on appeal, Charles Patterson vs. Edmund P. Gaines and wife, now of record in the office of the clerk of this honorable court in the city of New Orleans, and which entire record and the decree of said Supreme Court your orator and oratrix pray may be referred to by them if necessary, be annexed to or filed with this their bill of complaint, and be made a part hereof, and, when annexed or filed, be designated in Schedule "S."

"And your orator and oratrix further show unto your honors, that the said Richard Relf and Beverley Chew, with other of the defendants in the aforesaid suit were parties to the testimony and all and singular thereof, taken in said cause, and upon which said decree was rendered, having, by their solicitors duly authorized, appeared
200 in said cause and propounded cross-interrogatories to said wit-

nesses, by reason whereof the said Relf and Chew, and all and singular, the persons holding under them, are forever bound and concluded, by said decree, as your orator and oratrix verily believe and charge.

"And your orator and oratrix further show unto this honorable court, and expressly charge that your oratrix now claims to be and is the forced heirs, as aforesaid, of the said Daniel Clark, deceased, and in that capacity she is legally and equitably entitled to four-fifth parts of of all and singular that portion of the lands, property, estate, rights, and equities belonging and appertaining to the estate or succession of the said Daniel Clark, deceased, hereinafter particularly mentioned and described in this bill of complaint.

"And your orator and oratrix further show unto your honors that your oratrix has received no portion of the money or property of any kind, so as before stated, conveyed by said Daniel Clark to his friends, for the use and benefit of your oratrix, except as is before
201 stated.

"And your orator and oratrix further show unto your honors, that the aforesaid Mrs. Mary Clark, of Germantown, in the State of Pennsylvania, the mother of the said Daniel Clark, deceased, being the sole devisee named in his said will of 1811, as your orator and oratrix are informed, did, on or about the 1st day of October, 1813, execute a certain instrument in writing, authorizing the said Relf and Chew, jointly and severally, to be her true and lawful attorney or attorneys, in her name to take possession of all and singular the said succession or estate of said Clark, and to do all things in respect to said succession, in the same manner, and with the same effect as she, the said Mary Clark, could do. That, on or about the 22d day of November, 1817, she, the said Mary Clark, executed her last will and testament, in and *and* by which said will, she instituted, as her heirs, her daughter, Eleanor O' Bearne, of Sligo, in the kingdom of Ireland; her daughter Jane
202 Green, of Liverpool, England, wife of George Green; her granddaughter, Sarah Campbell, of Pennsylvania, and to Caroline, named in said will, Caroline Clark, born Caroline Degrange, late Caroline Barnes, wife of John Barnes, of St. Louis, State of Missouri, now deceased, to share said estate in equal proportions. That said Mary Clark departed this life on or about the day of June, 1823, and that her said will was duly probated. That in and by said will of Mary Clark, Joseph Reed and William E. Hulings, of the city of Philadelphia, were nominated and appointed executors thereof. That, on or or about the 2d day of December, in the year 1823, the said Joseph Reed, by a certain instrument in writing, did constitute said Relf and Chew, attorneys-in-fact for him, and, in his name, to do all things whatsoever which he himself might do in respect to said will of Mary Clark.

"And your orator and oratrix further show unto your honors
203 that the said Eleanor O'Bearne died, leaving Eleanor McNiff, now wife of Peter McNiff, of the city of St. Louis, her heir-at-law, and the said Caroline Barnes, wife of John Barnes, is also dead. The names of her heirs are at present unknown to your orator and oratrix;* but they are informed that that they reside in St. Louis aforesaid. That the said Jane Green also died, leaving heirs whose names are at present unknown to your orator and oratrix;* but they are informed and believe that their residence is at Liverpool, in the kingdom of Great Britain. That Sarah Campbell now resides some wherein the State of Pennsylvania."

(Reference approved.)
F. A. WOOLFLEY, *Clerk.*

And these defendants, for further answer in this behalf, do say that each and all of the aforesaid charges, made by the said complainant against said F. de la Croix, were also made against each and all of the defendants to said original bill No. 122, and against such other defendants not originally made so, but who were so made by some of the said supplemental bills, bills of revivor, and amended bills as were filed
204 in this court in some of the causes aforesaid, and that the said charges are precisely the same in substance and effect as those made against these said defendants, by complainant in her present bill of complaint. That they are precisely the same; and they aver that they were themselves respectively parties defendants to said original bill of complaint, or were subsequently made so by supplemental or amended bills, except in this that, as to the defendant The City of New Orleans, her present charter did not then exist. That the original corporation of the Mayor, Aldermen, and Inhabitants of New Orleans, was dissolved by an act of the legislature, and in the year 1836, the then city was subdivided into three distinct corporate bodies, called municipalities, numbered one, two, and three. That by law the property now charged by complainant in her bill to be in the possession of the defendant The City of New Orleans was then vested in Municipality No. One, and said municipality was made one of
205 the defendants aforesaid; that, since then, the aforesaid municipal corporations have been consolidated, and this defendant The City of New Orleans hath, by public law, succeeded to all of the rights and obligations of said municipality; that if either of these defendants was not formally a party of said original or amended bills, yet the property, now claimed by him, as hereinbefore stated, was involved on the issues made in said suit, and was owned by parties who were parties to said suit or suits.

And these defendants now aver and each for himself avers that they or those under whom they claim, and to whose rights they have respectively succeeded, and each of them, took issue upon all of the allegations in said original bill, and on all allegations in each and every of the amendments thereto made, in each of the revivors therein made, and on each of the sundry supplemental bills thereto made and attached; that the issues therein joined were fully heard upon the merits thereof
206 in this honorable court upon said original amended and supplemental bills, and the answers thereto by the several defendants who did answer, and upon the exhibits filed and the testimony taken and submitted, and this honorable court did give a final decree upon the merits of the controversy therein raised, discussed, and submitted, dismissing the said complainant's original supplemental and amended bills, without any reservation whatsoever, and in the known, recognized, and usual form to make such decree final, forever, unless reversed upon appeal; that said decree was and is final—that it did not dismiss the complainant's bills aforesaid without prejudice to the claim of complainant, but was and is absolute in form and law; that as to all and singular each and every of the charges, claims, and statements of complainant in her said original bill and supplements and amendments thereto, as also
207 all of the matters of fact stated by the defendants thereto in their respective answers thereto and set forth therein as new matter in avoidance of complainant's claims, the whole are res judicata against the claim of complainant as set forth in her present bill of complaint; that the claim therein put forth was to the ownership of the properties and rents, their increase, precisely as is now claimed in her said bill of complaint; and they aver that the grounds of claim are the same, and at

all events that she having gone to hearing in said cause on her claim to the property now claimed by her in her present bill of complaint, she was bound to state her entire title then to said property, of all natures and kinds whatsoever, and if any of her grounds of claim were inconsistent, she was bound to then elect between them; and having done so, she is precluded from setting up now in this suit, a claim precise in its nature with the other, even if placed on other grounds from the
208 other. Such a proceeding, if allowed, would make a court of equity an intolerable burthen to a community, by keeping up and allowing eternal litigation, in place of being, as it is regarded, a blessing to the country, by giving, among other things, quiet and repose to titles, and suppressing old and stale claims, such as is set forth in the bill of complaint in this case; and these defendants now, for defence to the complainants present bill of complaint, refers to said original bill, as well as to the several amended bills, bills of revivor, and supplemental bills of complaint by said complainant, filed from time to time, in this honorable court, and numbered 122, 1731, 1728, 1785, 1729, 1784, 1408, and 1820 on the docket of this honorable court, as well as to the pleadings of whatsoever nature and kind soever the name may be, with the exhibits therein referred to by defendants and to the final decree of this honorable court therein and thereon.

209 And they aver, for further answer herein, that from said final decree the complainant therein, being the same as the complainant herein, prosecuted an appeal to the Supreme Court of the United States, and there, after argument, the said decrees of this honorable court in said several cases were affirmed, and the mandates of said Supreme Court have been filed in this honorable court; all of which proceedings these defendants refer to as exhibits herewith; and the said decrees and affirmance thereof as aforesaid, they set up by way of answer and defence to said bill of complaint, and saith that the claim of complainant, as stated in her present bill of complaint, is identically the same as was presented and prosecuted by her to final decrees as aforesaid; and they now interpose the said decrees as part hereof, as res judicata, and concluding the complainant forever against setting up or otherwise prosecuting defendants for any claim which she hath or may pretend to have, upon any grounds whatsoever, to the property and supposed rights
210 stated in her bill of complaint and prays the judgment of the court whether they should make any other or further answer to the bill of complaint herein.

And the defendants say, for other and further answer to the bill of complaint, that when the aforesaid amended and supplemental bills No. 1731, 1728, 1785, 1729, 1784, 1408, and 1820, were filed in this honorable court, the defendants then and therein, among other things, present their allegations, based upon the facts therein stated; that the complainant therein, and the complainant herein, was not the legitimate child of Daniel Clark, but was in fact an adulterous bastard; that as such she had no rights whatsoever as heir-at-law of Daniel Clark; that as such she had no rights whatever to receive even a legacy from Daniel Clark or any testamentary benefit from himself whatever; that upon the allegations in the said answers of defendants therein, an issue was joined; that the final decree rendered embraced said issue joined, and was
211 found against the complainant; that by said decree the status of complainant was finally and irrevocably fixed, the effect whereof was to decree her status to be that of an adulterous bastard; that the same issue was made by other defendants to said original bill and among them by Richard Relf and Beverley Chew, a copy of their answer in print

being also hereto annexed, as an exhibit, the original of which is on file in said case, and to which defendants pray leave to refer *to* as part of this their answer; that upon issue joined in said cause upon the status of complainant, it was decreed and forever fixed that she is an adulterous bastard, which fact and status defendants here set forth as defence against her claim in her present bill of complaint; that the issue there joined was that complainant was the child of one Zulime Degrange; that at the time of the birth of complainant and for several years previously, the said mother of the said complainant was the lawful wife of Jerome Degrange, and that, if the fact was true, as then charged
212 by complainant and now charged by her, that Daniel Clark was her father, then she was an adulterous bastard, incapable of inheriting from him, the said Daniel Clark, or of receiving, either directly or indirectly, any legacy by testament from him in any way or form. That the issues in all said cases upon the status of complainant were found against her, and the decrees in said cases upon the status of complainant are final and irrevocable, and by way of answer are now insisted upon here as an ample and sufficient answer and defence to the entire bill of complaint. And defendants submit whether they shall be called upon for other or further answer in the premises.

And for other answer and defence to said bill of complaint, by protestation, &c., the defendants say that the complainant, in and by her said bill of complaint, admits that it hath been judicially decided in this honorable court, and affirmed by the Supreme Court of the United States, that she is not the heir-at-law of the late Daniel Clark;
213 and that she now, in and by her present bill, attempts to avoid the legal force and effect of said decree by her referred to, by setting up a supposed and pretended will averred by her to have been made by Daniel Clark, in the month of July, 1813; averred by her to have been probated in the second district court of New Orleans by order and in virtue of a decree of the supreme court of the State of Louisiana, made in the month of February, 1856, whereby she alleges that the said Daniel Clark acknowledged the said complainant to be his legitimate and only child, and as such bequeathed to her all the estate, real and personal, of which he died possessed, after the payment of debts and legacies. Whereas these defendants for answer thereto and for defence against said and all similar averments in said bill, say that no declarations or acknowledgments which said Clark may have made in the will made by him as averred by complainant, (but which are not admitted by these defendants to have been
214 made, but, on the contrary, expressly denied,) would make that declaration true in fact which was veritably false; that she can have and take no advantage from any such declaration of Daniel Clark, even if made; that the fact itself hath been finally and judicially decided contradictorily with the complainant herself to be otherwise in truth, and it is not competent in law for complainant to set up mere declarations of Daniel Clark to annul and set aside a decree of a court of justice, as is herein attempted. If complainant had been the legitimate child of Daniel Clark, as charged, she would have been his heir-at-law, and it having been decided as stated, that she is not the heir-at-law of Daniel Clark, the decree necessarily included the fact that she is not his legitimate child, and the same is therefore now here set up as a complete and full answer to said bill of complainant in all its parts wherein it is charged that Daniel Clark acknowledged the complainant to be the legitimate child of said Daniel Clark And for further answer
215 in this behalf, if any further answer be necessary, defendants

say that if any such acknowledgments were ever made by Daniel Clark as are stated in said bill of complaint, to wit, that said complainant was his legitimate child, the same were not true, and have been so adjudged in the proceedings aforesaid in this honorable court and the Supreme Court of the United States, which defendants plead now and by way of answer insist upon the same as res judicata.

And for other and further answer in this behalf defendants say that it is shown in and by complainant's bill of complaint that the said Daniel Clark, in and by his pretended will by her set forth in her bill, did duly appoint executors thereof; that he ordered his debts to be paid and his legacies discharged; that for all such and such like purposes the second district court of New Orleans, being the probate court for the parish and city of New Orleans, hath exclusive cognizance
216 of the matter of the settlement of said succession; that this honorable court hath no jurisdiction whatever in probate matters and cannot have and maintain jurisdiction in this case because of the state of things in reference to the succession of Daniel Clark, as disclosed in the bill of complaint herein; that to do so would bring the authority and jurisdiction of this honorable court into conflict with the jurisdiction of the said second district court of New Orleans, contrary to the public policy and to the manifest disturbance and harmony which the peace and public interest require should be preserved and cherished between the Federal and State judicial tribunals; that by the showing of the complainant the said second district court of New Orleans, being seized of jurisdiction of the whole subject-matter of said succession in so far as all and singular probate matters appertain thereto, it is the lawful duty of said court to cause true and full inventories
217 to be made of all and singular the real and personal estate of said succession, and, among others, the same property and rights stated in the bill of complaint herein, if the same doth (which is not admitted, but denied,) belong, or if any person whatsoever should claim that it doth belong, to said succession; that if it doth so belong (which is denied by defendants) then it is applicable, with other property, to the payment of the debts and legacies of said Clark in the due course of the probate administration of said estate, but the said complainant in and by her said bill is here unjustly and unlawfully, according to her own showing, endeavoring to obtain from this honorable court a decree to the effect that a mere legatee under an alleged will can separate a portion of the effects, property, and rights of the succession, still in a course of probate administration, from the remainder of the succession, oust the aforesaid second district court of New Orleans of its jurisdiction pro tanto, as to the said property, effects, and
218 right, to be handed over, not to an heir-at-law, but to a simple alleged legatee, in disregard of the rights of all creditors and other legatees, which said attempt this defendant saith is unlawful, and said unlawfulness is now by him, by way of answer, insisted upon as a defence to the whole of said bill and its objects.

And the said defendants, by protestation, &c., not confessing, &c., but denying, &c., for other answer to said bill of complaint, *if any be necessary, say, in answer to all and singular that part and portion of said bill of complaint* which sets forth and professes to detail the facts and circumstances of the application of complainant to the aforesaid second district court of New Orleans, for probate of a will pretended by her to have been made by Daniel Clark; her appeal to the supreme court of Louisiana; the action of said last-mentioned tribunal thereon, and proceedings subsequently

Reference approved.
F. A. WOOLFLEY, *Clerk.*

in said second district court, these defendants say that the whole of said proceedings and the final action thereon were and are utterly null and void ab initio, because they say that the will made by said
219 Daniel Clark, on the 20th of May, 1811, as hereinbefore stated, having been properly presented in the then probate court of the city of New Orleans, to the jurisdiction and records of which the said second district court of New Orleans had succeeded in due course of law, the same being therein duly ordered to be probated, its execution awarded, the legatee therein named being thus duly recognized, and consequently authorised to take upon herself the seizin of the property left by Daniel Clark; that the said proceedings stood as a judgment of competent and exclusive jurisdiction in the premises; that said judgment was never appealed from; the probate of said will, the order that the same should be executed, the granting of letters testamentary thereon—all remained of record, unreversed, uncalled in, unrevoked, or in any manner whatsoever affected or annulled; that therefore no subsequent proceedings in said court or elsewhere could be lawfully
220 had, without a direct action to annul the probate of said will, dated as aforesaid, on the 20th of May, 1811; to annul the order for its execution and revoke the proceedings ordering letters of executorship to issue thereon, and therein to do the same contradictorily with the executors of said will, or with the forced heir, and by said will the universal-instituted heiress of said Daniel Clark, and such others as held lawfully-acquired rights under said probate proceedings of 1813, but that in truth so to do, the said complainant failed and refused to make a contestatio lites with any person or persons whatsoever.

That Richard Relf, the only then surviving executor of said will of 1811, hearing of the extraordinary and extra-judicial proceedings of complainant, by a notification from said court, went into said second district court of New Orleans, and offered to contest with the complainant the truth of the averments made by her as to the existence of any such will as she pretended was made by Daniel Clark in 1813. That de la Croix, also hearing accidentally of said extra-judicial
221 proceedings to establish said supposed will of Daniel Clark, averred to have been made in 1813, by which it was alleged, said de la Croix was constituted an executor, and the only present surviving one, did go into said second district court, and make himself a party in said application, and prayed that the said proceeding should be fairly and openly conducted by said complainant, contradictorily with the said Mary Clark or her present legal representatives; that complainant refused so to proceed; insisted on her right to proceed in that behalf without any contesting parties, and the court having so decided that, by the laws of Louisiana, her right to be, inasmuch as by the laws of Louisiana, no ex parte order of probate or otherwise could be held to be in any way or form, or in any court of justice, of any binding or valid force whatever upon any person or persons, and with such views both the said second district court of New Orleans and said Supreme
222 Court decided that said complainant might proceed in an ex parte manner, submit whatsoever evidence she pleased, without the right even of any person to intervene and controvert the same; wherefore these defendants say that the said complainant, under such circumstances, ought not to be allowed to set up said proceeding now put forth here by her as Exhibit "A," as they are of no lawful or binding force whatever, were gotten up by complainant for the purpose of evading and avoidng a contest upon the truth of her allegations upon which said proceedings referred to by her were based. Therefore defendants

say that said proceedings being ex parte, of no force or validity, having been conducted by complainant in bad faith and for a purpose without any claim to the equitable consideration of this court. They therefore say that said proceedings should not be regarded in this honorable court as having any binding force upon the court itself or upon these defendants.

And defendants, further answering in this behalf, say that the
223 said proceeding by complainant, set forth in her bill as Exhibit A, should not be held to affect the title of defendants to the property in question in any manner whatever; because, in addition to the facts already stated and insisted upon as defence, they say that the said will of Daniel Clark, of 1811, having been probated, and its execution having been duly ordered, that the same standing as a valid, subsisting judgment at the time these defendants acquired title to the property mentioned in the bill in manner and form as hereinbefore stated, their titles thus derived could not be invalidated by the fact, if true, (which is denied) the complainant had, as she alleges, a permanent right to the succession of Daniel Clark over and to the exclusion of the said Mary Clark, and she is bound in law, equity, and good conscience to look to said Mary Clark and her legal representatives for the proceeds of the said property, to wit, the price so paid into the said succession of
224 Daniel Clark. And furthermore defendants say, that they having paid for said property as aforesaid the amount of the purchase-money to the then lawful representatives of the succession of Daniel Clark and the agent of his instituted heiress, who was also his heir-at-law; that, in the year 1838, in the court of probates aforesaid, having probate jurisdiction, on an application made by the attorney of the absent heirs of Daniel Clark, the said court did order and decree that the said Richard Relf and Beverley Chew, the executors of Daniel Clark and agents of Mary Clark, as aforesaid, should file an account of their administration, as aforesaid; that, in obedience to said order the said Chew and Relf did, on or about the 27th of August, 1838, file said account in said court; that the said court, then proceeding as a court of probates in rem, did cause an order to be passed requiring an unusual long and wide-spread publication to be made of the fact that said account had been filed, and calling upon all persons whatsoever, interested in
225 the succession of Daniel Clark, to show cause why the said account should not be approved and homologated, and the funds distributed in accordance therewith; that at that time complainant was of the full age of majority; was fully advised of and concerning said succession, and if she had then chosen to oppose said account, upon any ground whatever, she could have done so; that she did not so oppose; and after a long time judgment was given by said court, approving of said account and ordering the same homologated; that in and by said account it was shown that the price so as aforesaid paid by these defendants for said property, or that paid by those under whom they respectively claim and hold, had been appropriated to the payment of debts and liabilities of the said succession of Daniel Clark; that the same, therefore, inured to the use and benefit of the representatives of said succession, whoever they were; and it would be mani-
226 festly unjust and against all equity to hold that defendents, who purchased the property in question for a full and fair price which they actually paid, or which was paid by those under whom they severally hold, to the only known, present, and acting representatives of the succession of Daniel Clark; that defendant's money, or that of those under whom they claim title, should have been received and applied to

the payment of the debts of Daniel Clark; that such payments should have been duly approved by a judgment in rem of a court of competent jurisdiction without opposition; and that it should be now held that defendant should be held in any manner to account to any person whatever; wherefore he now urges the aforesaid matters as answer and defence to the claim of complainant.

And for other and further answer to all that part of the bill of complainant which charges that the whole of the estate of said Daniel Clark, by the laws of Louisiana and in pursuance of said last will
227 vested in said complainant on the death of said testator, subject only to the payment of the debts and specific legacies contained in the said last will and testament (meaning thereby the pretended last will and testament) of Daniel Clark, these defendants, by protestation, &c., not confessing, &c., but denying; &c., say that they are advised and believe, and therefore, by way of defence, they answer that there are no such laws in Louisiana as those charged to exist, nor *was* there at the time of the death of Daniel Clark; but, on the contrary, they answer, that the laws of Louisiana, as they then existed, provided that if an heir was present and accepted the succession, such heir, unless acceptance was made under benefit of inventory, took into possession the whole of the effects of the said succession, whether the same consisted of real, personal, or mixed estate; that such possession might be done without the intervention of any court of justice in any
228 form or manner whatsoever, and at such time and in such mode as it might suit the convenience or inclination of such heir, who thereupon, on such acceptance, express or tacit, of the succession, became personally liable for all the debts of the succession; that the heir thus referred to by the law included not only forced heirs, but also heirs instituted by will and testament; that if an heir thus presented himself or herself, and was the apparent forced heir or the real instituted heir, and accepted the succession without benefit of inventory, expressly or tacitly, and took possession of the effects of the succession, all of the acts and doings of such apparent or forced heir, or testamentary instituted heir, all sales of property and conveyances thereof made by either of such heirs while thus in possession, or otherwise manifesting dominion as owner, were perfectly good in law and valid to all intents and purposes, to the exclusion of all rights which any other heir or
229 heirs, of any nature or kind whatsoever, though he, she, or they might in truth be a paramount heir to the one who had thus, as stated, taken possession; the conveyances and titles being good and valid, the law turned over the paramount heir who might subsequently appear and be recognised to the apparent or instituted heir, to account for the proceeds of any such property so sold and conveyed; but the law did not, and would not allow the purchaser, being thus a third possessor in good faith for a valuable consideration, to be disturbed in his title, possession, and purchase of property.

And, furthermore, the said defendants, answering herein, say that the law, as it stood in force in Louisiana at the time of the death of Daniel Clark, and at the time of the purchases so as aforesaid made by defendants, did not pass into the heir, either forced or instituted, of a deceased person; but the law, on the contrary, provided that, from the day of the death of the party until the heir-at-law or instituted heir should
230 appear and claim possession of the estate, either as heir or under other title, the said estate should be deemed and taken to be a vacant estate, and that vacant estate was neither represented by the heir of the deceased, nor did it represent the heirs of the deceased in

any respect whatsoever. There was no legal connection whatever between the estate of the deceased and the heir-at-law or instituted heir, except in this, that the law, as it then stood, recognized the faculty in both classes of said heirs, within a limited time after the death of the person whose estate was claimed, to present themselves, and manifest, in a lawful manner, their intention to accept such estate thus remaining vacant, and which said acceptance, being a voluntary act of the heir, the law provided should revert back, and have effect as of the day of the death of the party whose estate was claimed; but the law, at the same time it gave such advantage to the act of the heir, most justly provided
231 that, while it preserved to the heir the faculty of accepting an inheritance, it was under the express condition and limitation that, in the mean time, there had been no other acceptance by other heirs, and also expressly reserving all rights which might have been acquired by third persons upon the property of the succession, either by prescription or other lawful acts.

And the defendants further answer herein that they are advised and believe, and therefore, by way of answer and defence herein, say that the law, as it stood at the time of the death of said Daniel Clark and of the purchases, &c., as aforesaid, made by these defendants, was thus: That, after the death of a person leaving an estate in Louisiana, until said estate was lawfully accepted by an heir, the same did not vest in said heir on or by the death of the ancestor or testator; but in either case, until said heir presented himself, and claimed the possession of the estate, the same was called a vacant estate; that, by provisions of law, the vacant estate in no manner represented the heirs of the deceased,
232 but it was declared to be a fictitious being, representing in every respect the deceased; that when an heir of the deceased came and took possession of an estate, the law at once recognized the said heir thus in possession as vested with the entire title to all the effects thereof, and there could be no other recognition of any other heir or any acceptance of an estate already accepted; and such other heir subsequently appearing could only have a claim of paramount right to the estate recognized in a proceeding taken contradictorily with the heir who had already accepted and taken possession, and then only in subordination to rights of third parties acquired in the meantime; that the same law of Louisiana also limited the time within which an heir of any sort or species could accept an estate, that is, the faculty of accepting an inheritance becomes barred by the lapse of thirty years; that the law of Louisiana, as it stood at the time of the death of Daniel Clark, and as it now exists in this behalf, is this: that, if a person makes a last
233 will and testament by which he disposes of the whole of his estate to another other than his forced heir, if there be such forced heir, that said testamentary dispositions are not void, but in law are good, and sufficient to convey the entire title of the whole estate, real, personal, and mixed, to the instituted heir upon said will and testament being duly probated, and said instituted heir hath accepted the estate; that all acts, deeds, sales, and conveyances of such instituted heir while in such possession would be perfectly valid; and that in such case, if there should be any claim to the estate set up either by a forced heir or instituted heir under a subsequent will, it can only be done contradictorily with the heir who hath accepted and taken possession, and then not for the purpose, in case of forced heir, to set aside the will and testament, which may have been probated, as being null, for it is not null, and the right of the forced heir is confined to an action of reduction in order to reduce the said will in its application to the quantum,

which the law denominates the disposable portion; that, until
234 said action be instituted, the law holds such will to be perfectly valid, disposing by good title the whole estate; that the heir thus complaining against a testamentary disposition was and is confined to the heir-at-law, or those in whose favor the law reserves the legitim'e or legal portion, or by their heirs or assignees, and such action could not be maintained by an instituted heir, a donee, legatee, or creditors; that such actions of reduction are prescribed against by the lapse of five years from the date of the probate of the will and testament; that, by law, if the heir be absent from Louisiana when the will is proved and its execution is ordered, the testamentary executor may take seizin of the property, though none be given by will, and sell the said property, and hold the proceeds in place thereof; all of which several laws these defendants specially set forth by answer to said bill of complaint, and as an ample and sufficient answer and defence thereto.

235 And the said defendants, for other and further answer, by protestation, &c., say that in and by the bill of complaint the said complainant hath set forth and claimed, among other things, that, in and by a pretended will, said by her to have been made by Daniel Clark, in 1813, she became entitled to the entire estate of Daniel Clark, with the small exceptions stated by her; and, among other property, the property mentioned in her said bill as possessed by these defendants: Now, therefore, they insist, by way of defence thereto, that complainant hath not shown, by her own statements in that behalf, any case whatsoever wherein a court of equity should lend its aid to her relief, because of the vague, uncertain, and imperfect manner in which she hath stated her case in that behalf, in this, among other things, that she hath not shown when or how the said Daniel Clark became the owner of the property aforesaid; she hath not alleged or shown in any manner whether said properties were the individual property of Daniel Clark, or whether they were held by him as the head of a community which must have
236 existed between him and the mother of the complainant, if she was the legitimate child of Daniel Clark, (which allegation of complainant is not admitted, but, on the contrary, is here specially and at all times denied;) therefore if such a community ever existed, (which is not admitted,) the alleged will of Daniel Clark, said by complainant to have been made in July, 1813, (which allegation is not admitted,) did not and could not attach in any event to more than one undivided half of said property; and that after the debts of the estate of Daniel Clark, and all of his legacies were paid, which want of a proper averment and showing in said bill of complaint, defendants sets up by way of answer, and insists upon the same as a defence to said bill of complaint, and aver that they have a lawful right to set up any and all outstanding titles in any and all persons to protect themselves against the claim stated in said bill of complaint, and which, accordingly, they
237 do set up, and, so far as the same may be regarded as just and equitable in this behalf, claims all advantage therefrom.

And for further answer and defence herein, by protestation, &c., said defendants say that, in and by an amended bill of complaint filed by said complainant, and her then husband, E. P. Gaines, on the 2d day of July, 1844, or thereabouts, in the matter of her then pending proceeding in this honorable court, No. 122, as aforesaid, she did set up title to the very property she now claims, then as now, against these defendants, or against those under whom they respectively claim title as aforesaid, by virtue of an alleged conveyance made to her "of one moiety of the estate of which Daniel Clark died possessed, by reason of a conveyance *made*

thereof, made to her by M. Z. Gardette, the widow, (as was alleged in said amended bill, but not admitted by defendants,) of Daniel Clark, and the mother of the complainant, on the 7th of May, 1836, and which (conveyance) is hereto annexed (to her said amended bill) marked
238 A B," and she prayed that the same be taken as part hereof.

And in the same amended bill the complainant alleged that her "mother did, thereafter, on the 20th June, 1844, further convey to her (the complainant) all her (the said mother's) interest in said estate, (the estate of Daniel Clark,) as appears by her act, a copy of which is herewith exhibited, marked C, the whole of said estate having been acquired during the coverture of said Clark and wife."

These defendants now set up the said amended bill and exhibits not as containing the truth, other than as to the fact that the mother of complainant did make the acts averred and set forth by the complainant, but as an ample and all-sufficient estopp*le* in law and equity against the said complainant now setting up or pretending to title to the properties in question, against her aforesaid claims to the same properties from another, and wholly adverse chain of title and conveyance, and her own positive averment in her said amended bill, that said property
239 and all others mentioned and referred to in her said original bill and amended bill, belonged to the community which had subsisted between her alleged father, Daniel Clark, (an allegation of paternity not admitted,) and her mother, M. Z. Gardette, and her said positive allegation that the whole of said property, including the slaves in question, was acquired by Daniel Clark during his alleged coverture with the mother of complainant; and these defendants answer, that said averments of complainant were made in the course of the said judicial proceedings and are binding upon her as an estopp*le* to her claims as now presented in her bill of complaint, and they set the same forth and urge them accordingly, by this answer, as a defence so far as the same ought to avail them as such.

And the said defendants, for further answer, by protestation, &c., say that, in and by her original bill and her several amended and supplemental bills in her aforesaid case, No. 122, and the several other numbers which she gave to sundry of her said causes therein on the
240 docket of this court, the said complainant hath at all times admitted and averred that her mother was named Zulime, who was born Carriere. And now these defendants expressly set forth and urge by way of answer, and say that the mother of said complainant, to wit, Maria Julia, commonly called Zulime, nee Carriere, was duly and lawfully married to Jerome Degrange, sometimes called Geromme Des Grange, in the Cathedral Church of St. Louis, in the city of New Orleans, in the year 1794; that the said marriage was never dissolved until it was so dissolved by the death of said Jerome Degrange, which did not take place for many years after the birth of the complainant, and after the death of Daniel Clark, and the mother of said complainant having been thus united in wedlock to the said Jerome Degrange, who was living at the time of the birth of said complainant, defendants expressly deny that complainant is, as alleged by her, the legitimate daughter of Daniel Clark, and they deny that said Daniel Clark, ever so acknowledged her; and if he did, defendants deny that it was true, but aver
241 that such declaration, if ever made, was utterly untrue. They aver that the mother of complainant, many years before the death of the said Daniel Clark, intermarried, in the city of Philadelphia, to a gentleman by the name of Gardette, and lived with him during the entire lifetime both of Daniel Clark and said Gardette, a

fact utterly inconsistent with the idea that the said mother of complainant was then the wife of Daniel Clark.

And defendants say, that such well-known facts render the case of the complainant here, one in which she must utterly destroy and degrade the character of Daniel Clark and her mother Zulime, nee Carriere, Madame Degrange, subsequently Madame Gardette, more recently Widow Gardette, and now very recently placed in her grave; that a case so utterly revolting to every obligation which a child owes to a parent—in violation of every law, human and divine, should not be allowed to be prose-
242 cuted in a court of justice, and defendants answering, urge said facts, and present them here why the bill of complaint should be dismissed, and they not required to make further defence thereto.

And in this connection, and in this same behalf, these defendants further say, and urge as answer to said bill of complaint, that the said mother of the complainant, was also the mother of another child, a female child, whose name was Caroline; that the said Caroline was older than the complainant, and intermarried with Doctor John Barnes; that during the pendency of complainant's aforesaid original suit in chancery, in this honorable court, the said Caroline and her husband were made parties thereto, by the voluntary act of the complainant therein and complainant herein, as also to her amended bills; and the said Caroline, the sister of said complainant, together with her said husband, also were called to answer said original bill and amended bill, and thereupon, on or about the 12th day of May, 1845, the said Caroline and her husband, John Barnes, did file their joint answer in said
243 cause then pending in this honorable court, in which, among other things, the sister of said complainant, to wit, Caroline Barnes, did answer under her oath, of and concerning the legitimacy of said complainant, and of and concerning the fact alleged that she, said complainant, is the legitimate child of Daniel Clark, and of her mother, that—

"In respect to the averments of plaintiff, Myra, that her mother was the lawful wife of Daniel Clark and that plaintiff, Myra, is the only legitimate child of that marriage, defendants answer and say that a more exaggerated fiction was never wrought up from a tissue of circumstances which comported so little with such conclusion, and which these defendants are too painfully conscious can admit of no apology, no explanation at which mortality must not blush, and these defendants especially deplore. They are informed and believe that, about the the year 1796, Zulime Nee Carriere, of New Orleans, intermarried with one Gerome De Grange and lived with him for several years, till about the year
244 1801, when, from some cause unknown to these defendants, they separated, having no children, as far as they are informed. After this time an illicit intimacy intervened between said Daniel Clark and the said Mrs. De Grange of which this defendant, Caroline Clark Barnes, was the acknowledged issue and the plaintiff, Myra, was the reputed issue; though this defendant Caroline, has been frequently assured by her mother that she, Caroline, was the only child of Daniel Clark, and reports from others, assuming to know, have verified the same fact; that Daniel Clark was imposed upon and deceived into the belief that the said Myra was his child when she was, in truth, the child of another man. This adulterous intercourse continued at intervals, as respondents are informed, till about the year 1804, when Daniel Clark withdrew from the said Mrs. Degrange, and being absent from New Orleans about the year 1807, as a delegate in Congress, became by report an

accepted lover of Miss Louisa Caton, of Baltimore, now defendants believe, the present Duchess of Leeds.

245 "In the year 1808 the said Zulime, being then in Philadelphia and without having received any divorce from her husband De Grange, received the addresses of a Mr. James B. Gardette, and, thereupon, intermarried with him, which marriage defendants believe was publicly solemnized in the Roman Catholic church of St. Joseph, in the said city of Philadelphia, and, after residing with him in Philadelphia until about the year 1822 or '23, went with said Gardette to France and continued to live with him as his wife until his death which took place a few years since in France; during which time she bore him a family of several children some of whom were christened in the said church of St. Joseph, and some of whom, together with the said Widow Gardette, now reside in the State of Louisiana.

"All these facts the complainants know or have been informed of, and these defendants would most gladly have suffered them to repose in oblivion had not a perverted imagination attempted, from such humiliating circumstances, to work out a marriage with Mrs. De Grange

246 to Daniel Clark, and from thence the legitimacy of the complainant, Myra, to the subversion of the established rights of this defendant Caroline, and with an accumulation of dishonor and reproach upon both her parents greatly beyond that which a regard to truth and the necessity of the occasion required, and which has extorted this answer, painful as it has been to the respondents to be constrained to make it.

"These defendants declaring their information and belief but give expression to the general knowledge and opinion of all Daniel Clark's friends and acquaintances, that he was never married to the said Mrs. De Grange or any one else, and this defendant Caroline has heard from her mother her repeated expression of sorrow and regret that she had not succeeded in becoming the wife of said Daniel Clark. That she was not so in fact, and did not pretend to be is further evidenced by the record of her suits for alimony and damages against the said Geromme De Grange in the city court of New Orleans, in the years 1805 and 1806, and that the said Myra was not a legitimate child, and that her

247 guardian, Samuel B. Davis, well knew she was not, and that he did not conceal the fact from Myra and the public is evidenced by the record of a suit commenced in a court of New Orleans sometime about the year 1817 in which the said Myra is represented to sue Chew and Relf as Clark's executors alleging her cause of action to be that as the illegitimate child of Daniel Clark she was entitled to a support out of his estate: and both of which last-mentioned records will be relied on as proof in the cause."

And these defendants say that the complainant having averred her legitimacy in her said bill of complaint, they can but use the foregoing testimony of her own sister, the daughter of her mother called for by the complainant herself, and in all respects just and truly a family history, by one of her own family, made under oath, and they now refer to the same on file in this honorable court, and will use the same as testimony on the final hearing of this case, and by answer set it

248 forth as a defence to said bill of complaint, so far as in equity and law it should or ought to avail them.

And for other and further answer, by protestation, not confessing, &c., but denying, &c., the said defendants say, and each for himself saith, that for a long time previous to the death of Daniel Clark he had been engaged in enormously large speculations, and in mercantile enter-

prises, chiefly in connection with David W. Coxe, then and until lately when he departed this life; that the capital to carry on said speculations and adventures was, as defendants have been informed and believe, and so charge the fact to be, furnished by said Daniel W. Coxe; that a few years before, to wit, as near as defendants have been enabled to ascertain, in the month of July, 1811, the copartnership theretofore existing between said Coxe and Clark was dissolved by mutual consent; that at that time there were extensive lands lying in various parts of the State of Louisiana, and city lots of divers sizes, situated in the parish and city of New Orleans, and among them the identical pieces of ground and lots now described and referred to in the bill of
249 complaint; that it was ascertained that the titles to all lands, pieces and parcels of ground, and city lots as aforesaid, had been taken in the name of said Daniel Clark, which was done by mutual understanding, and for convenience. That, therefore, the legal paper-title to said real estate was in Daniel Clark, while the equitable title was in him and said Coxe, and he, the said Clark, held the same in trust for said Coxe and himself, subject to a settlement. That, at or about the time of the dissolution of said copartnership, a settlement took place between said Coxe and Clark; that Coxe abandoned to said Clark his equitable and dormant interest in the lands and city lots aforesaid, and thus said Clark became the absolute proprietor, on paying therefor as he then and there agreed to do. That in said settlement it was ascertained that said Daniel Clark was indebted to said Daniel W. Coxe in a sum of about five hundred thousand dollars. That, in
250 liquidation of a part thereof, said Clark handed over to Coxe the notes of General Wade Hampton, thereafter to mature, amount-to one hundred and fifty thousand dollars. That for the further and like sum of one hundred and fifty thousand dollars, Clark agreed to bring into market at an early day, and to sell said lands and lots, or so much thereof as would pay to said Coxe the said sum of $150,000. And Coxe agreeing to give reasonable time to Clark to accomplish said object. That, for the remaining part of the indebtedness of said Clark to Coxe, it being somewhat uncertain as to its absolute and real amount, and Clark at that time utterly unable to pay it, the said parties entered into an article in their settlement that from the date thereof Clark should pay to Coxe an annuity of four thousand five hundred dollars, payable cash, and every half year thereafter, so long as said Coxe should live.

That, before the dissolution of the said connection between Coxe and Clark, there had existed in New Orleans a commercial firm doing
251 business under the title of Chew & Relf, in which said commercial house said Clark had also an interest. That, immediately after the said Clark had dissolved his connection aforesaid with Coxe, he formed a new and more extended connection with said Chew & Relf, to wit, Beverly Chew, since deceased, and Richard Relf, still surviving; that they entered into written articles of copartnership, and among other things, said Clark acknowledged that all of the lands then in his name in the State of Louisiana, and the lots situated in the city of New Orleans, the titles to which were in the name of said Daniel Clark, were in fact, and from that day forth to be considered and taken as the joint property and estate of said Daniel Clark, Beverly Chew, and Richard Relf. And the defendants answering, aver that said lots now claimed by complainant were embraced within said agreement, and that any document or fact which would have been binding of said Clark in his lifetime, is binding upon the said complainant of, touching, and respecting the lots in controversy herein; and these defendants

252 have a just and lawful right to guard and protect their titles and possession to the several lots and parcels of ground herein claimed by them, respectively, and alleged in the bill of complaint to be in the possession of these defendants, respectively, and which outstanding title to two-thirds undivided interest in said several lots, existing at the time of the death of Clark, in the said Beverly Chew, and after his death on the 12th of January, 1851, in his heirs, and in the said Richard Relf. And these defendants, further answering in this behalf, say, and each of them saith, that a copy or duplicate of the aforesaid settlement between Daniel W. Coxe and Daniel Clark, as also a notarial copy of said articles of partnership between Daniel Clark, Beverly Chew and Richard Relf, were filed as exhibits or put in as testimony in the aforesaid suit in this honorable court, No. 122, or some of its subsequent numerous subdivisions, and defendants now refer to the same as part hereof, and beg leave to refer to the same now on file in said cause or causes aforesaid. The first as exhibit hereto to be cited as N.
253 O., H. E. L., D. L., No. 5, and the second as Exhibit N. O., H. E. L., D. L., No. 5.

And the defendants, for further answer in this behalf, say that said Daniel Clark, at no period during his lifetime ever paid his said vendor, Daniel W. Coxe, the debt aforesaid, and it remaineth to this day equitably binding upon the legal representatives of said Clark, and upon his heir; that, out of the first monies arising from said property, if it should ever be decreed to be yet legally in the heir of Daniel Clark, and especially in the said complainant, that it would be the worst species of injustice to decree to her property as the representative under the spurious and pretended will of said Daniel Clark, set forth in her bill of complaint herein, when said Daniel Clark acknowledged in writing that he himself had but an undivided one-third interest, and even that had not been paid for by him without protecting these defendants by decreeing that said interest of Daniel Clark in his lifetime was but
254 the undivided interest before stated.

And these defendants say, and each for himself saith, that, shortly after the settlement between said Coxe and Clark, in 1811, leaving Clark so enormously indebted to said Coxe, and, also, with an enormous quantity of real estate and city lots on his hands, the greater part, indeed, as defendants have been informed and verily believe was entirely unproductive and wild lands, in parts of the State then nearly desolate of inhabitants, and the titles to which were gravely doubted, real estate began to depreciate very rapidly, and the serious difficulties which had existed for several years previously between the Governments of the United States and England, not long after ended in open hostilities and war; that the effects of this national event were to completely paralyze every species of business in Louisiana, to render abortive all mercantile operations abroad, and to render lands and city lots absolutely worthless to the owners; none could be sold, no money
255 could be raised upon mortgage-securities on real estate; that, consequently, the commercial house of Chew & Relf, in which Clark was interested, suspended payments and finally failed. Clark could in no manner pay his debts, commercial or personal, and he struggled with adversity and absolute insolvency for a time, when he sickened and died in the month of August, 1813, at which time the property left by him at the current rates of value at that date would have paid but a small part of his debts.

And these defendants, for further answer, &c., by protestation, &c., not admitting, &c., say, and each for himself saith, that the said com-

plainant, in and by her several amended bills made to her said original bill, No. 122, as aforesaid, amongst other things did distinctly and advisedly, under the guidance of able and distinguished counsellors and solicitors, absolutely abandon forever, all and singular, whatever rights she might then have had under the said alleged will stated by
256 her to have been made by Daniel Clark, in the month of June, 1813, to wit, the identical one which she now sets up as the sole grounds of her claims as set forth in her present bill of complaint; that said abandonment was not in the nature of a discontinuance of claim in that suit then pending, with a reservation of a right to renew her claims thereafter under the same, if any she had. But, so far from there being anything like a discontinuance, even if a discontinuance she could have had in the then state of the pleadings in said case, she, in and by her amended bill, did declare that she still held on to all of her averments as to the existence of said alleged will; that she would take all the proofs she could obtain as to said will, its contents, and loss, but she would forever thereafter limit her claims under the same to a right to use it as a declaration made by Daniel Clark in that form of her legitimacy, and that she would thus use it in said causes to maintain her legitimacy and consequent result; that she was the forced heir of Daniel Clark, ergo, entitled to the property then claimed by her,
257 being, among others, the same properties claimed by her in her bill of complaint from these defendants; that, in and by her said amended bills aforesaid, complainant did also distinctly admit the validity of the will of said Daniel Clark, made in favor of his mother, Mary Clark, dated May 20, 1811, as aforesaid, and limited her claim to the lawful rights which she averred and set forth she had as the heir-at-law of the said Daniel Clark, and that his said will of 1811 was valid, but only attached to the disposable portion of his (the said Daniel Clark's) property, which she allowed him to donate causa mortis, having, as she averred he had, a lawful, legitimate descendant, to wit, herself. She admitted that said will of 1811 disposed of one-fifth part of the property of Clark, to wit, the disposable portion, and that defendants claiming under Mary Clark had a valid title to one-fifth part of said property; so that defendants, by way of further answer and defence, say, that complainant, having judicially abandoned all claim to the dis-
258 posable portion which the law allowed Daniel Clark to give away by will, on the supposition that he had a forced heir; and the courts having finally decided, in the aforesaid causes, that she had no claim, as she also admits in her present bill of complaint, to that part of the estate of Daniel Clark, belonging to the heir-at-law, these defendants insist and set forth said facts as an ample and sufficient answer and defence to the claims of complainant in her present bill of complaint.

And the said defendants, and each for himself, by protestation, &c., not confessing, &c., but denying, &c., say, and each for himself saith, in answer to the bill of complaint and the statements therein contained, that if, by any circumstances whatsoever, it should so happen that there should be a decree in favor of complainant, a contingency certainly very remote and never, in their judgment, to happen, while truth and justice rank as virtues on earth, and equity is administered
259 by recognized rules of law, yet, in contemplation of even such an event, then they say that she should not have a decree for the property in said bill described as she demands, because they say and put the same forth as an answer to the bill of complaint—

1. That, at the period of his death, he, the said Daniel Clark, was

largely and overwhelmingly in debt, and believed by these defendants, so far as they can at this remote period of time, to have died absolutely insolvent; therefore that said complainant, standing on her bill of complaint merely on the ground of being, as she avers, but as they do not admit to be true but wholly deny, a legatee and not as heir-at-law, she can take nor receive anything whatever, until she alleges and shows a full and final administration of the affairs of said succession; a payment of all its debts and legal liabilities, as also all of the legacies under his alleged will, and the discharge by payment of the legitime of the forced heir, to wit, Mary Clark.

260 That two-thirds of the property left by Daniel Clark, the title of which stood in his name, having, in fact, belonged to Beverley Chew and Richard Relf, the same should first be separated from the rightful estate of Daniel Clark; that, after the payment of the debts of said Daniel Clark and the setting aside two-thirds of the remainder to Chew and Relf as their individual property, the remaining one-third of the nett estate of Daniel Clark would have to be first divided into equal parts, to be divided between the heirs of the deceased and the widow of said Daniel Clark, inasmuch as by the showing of complainant, in her aforesaid original bill, No. 122 on the docket of this court, and the sundry amendments and supplements made by her thereto, that the whole of the property of which said Daniel Clark died possessed was community property, held by him and his alleged surviving widow. And these defendants say that, though it be revolting to every

261 principle of truth even hypothetically to suppose that Zulime née Carriere, the mother of complainant, ever was the wife or widow of Daniel Clark, yet they are obliged by the course of complainant to defend their titles to property honestly acquired and fairly paid for against a claim springing from the grossest associations, and having not one particle of equitable consideration to commend it to a court of equity, by all of the facts which lay within their reach. And furthermore, in this behalf answering, said defendants say that, in and by her said several suits aforesaid in this honorable court, she, the said complainant, did claim to be the owner of the property now herein in controversy and claimed by her, because of an assignment thereof made to her by her mother, Zulime, née Carriere, therein claiming to be the widow of Daniel Clark, and in community rights with him.

That the claim of complainant in that behalf as the assignee of the

262 rights of the alleged widow of Daniel Clark were passed upon both in this honorable court and in the Supreme Court of the United States, and were distinctly repudiated and rejected, all of which proceedings, judgments, and decrees these defendants, by way of answer, present as res judicata against the claims of the said complainant in this behalf, and her present complaint ought not, as they aver, to be further heard in this honorable court; that, after the aforesaid deduction from any property it may be shown that Daniel Clark died possessed—1st, by the payment of his debts; 2d, legacies; 3d, the recognition of the partnership rights of Chew and Relf as aforesaid to two-thirds of the remainder; 4th, the community rights of the alleged widow of Daniel Clark—the fraction remaining, if anything remained, would be subject to a further equal division, because they say that if the said complainant be the child of Daniel Clark by her mother, Zulime, née Carriere, then she had a sister equally legitimate with

263 herself, called Caroline Clark, who subsequently married with Dr. John Barnes, then of Philadelphia, but now of St. Louis, that is, Dr. Barnes himself, but that Caroline hath lately depart-

ed this life, leaving heirs-at-law, to wit, descendants, her surviving; and all of which outstanding claims, rights, and titles, real and hypothetical, these defendants have a right in law and equity to claim, interpose, and set up against the unjust claims of her, the said complainant, and which they accordingly hereby do, by way of answer and defence to the bill of complaint.

And said defendants say that they have taken cognizance of the answer of Francois Dusan de la Croix, filed by him in the complaint made against him by complainant in her bill of complaint in this honorable court, No. 2619 on the docket, and they refer to said answer; and, as far as its general statements and recitation of facts go, these defendants adopt the same, and make it part of this answer, and will furnish a copy thereof when and where this honorable court may allow
264 or direct, as an exhibit hereto and herein; and they also adopt, as part hereof, the exhibits filed with the said answer of said de la Croix, except those only referring to his title to his slaves therein named, and make the same exhibits hereto, in the same manner and to the same extent as if the said answer and exhibits had been transmitted herein and set forth.

And said defendants say, and each for himself saith, that they deny all manner of unlawful acts and doing wherewith they stand charged in said bill of complaint, without this, that there is any other matter, cause, or thing in said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of these defendants, they are ready and willing to aver, maintain and prove, as this honorable court may direct; and humbly praying to be hence dismissed with their
265 reasonable costs and charges, in this behalf most wrongfully sustained.

(Signed) J. J. MICHELL,
Solicitor for the City of New Orleans.

(Signed) DUNCAN & McCONNELL,
Assistant Solicitors for the City,
And Solicitors for Lameyer and Lanata.

Dominique Lanata, one of the said defendants, being duly sworn, on his corporal oath, doth declare that the facts stated in the foregoing answer, so far as the same are therein stated and set forth as from his own personal knowledge, are each and all severally true; and that so far as the same are stated from knowledge derived from others, he believes the same to be true.

(Signed) DOMINIQUE LANATA.

Sworn to and subscribed before me by D. Lanata this 4th April, 1857.

(Signed) J. W. GURLEY,
U. S. Comm'r.

E. H. Lameyer, one of the said defendants, being duly sworn, on his corporeal oath, doth declare that the facts stated in the foregoing
266 answer, so far as the same are therein stated and set forth as from his own personal knowledge, are each and all severally true; and

that so far as the same are stated from knowledge derived from others, he believes the same to be true.

(Signed) E. H. LAMEYER.

Sworn to and subscribed before me this 4th April, 1857.

(Signed) J. W. GURLEY,
Clerk & Comm'r.

Charles M. Waterman, mayor of the city of New Orleans, on his corporal oath, doth declare that the facts stated in the foregoing answer, so far as the same are therein stated and set forth as from his own knowledge, are each and all severally true; and that so far as the same are stated from knowledge derived from others, he believes the same to be true.

(Signed) CHA'S M. WATERMAN,
Mayor.

Sworn to and subscribed before me this 4th April, 1857.

(Signed) J. W. GURLEY,
U. S. Comm'r.

267 And now the said defendant Dominique Lanata, for this his separate answer to the interrogatories propounded to the defendants by the complainant as a part of her bill, answers and says:

In reply to the first interrogatory he answers: That with regard to the property mentioned and described in the complainant's bill of complaint in the fourth division of her description of property as a certain lot of ground on the north side of and adjoining a lot described in said bill of complaint as lot No. 3, and having 33 feet front on Burgundy street, and running back between parallel lines towards Rampart street, one hundred and twenty-seven feet, with all the buildings and improvements thereon, he says that he owns a lot of ground which he believes is substantially described in said bill of complaint as aforesaid, but he denies that said property was a part and portion of the estate of the said Daniel Clark, deceased.

268 In answer to the second interrogatory he saith: That he does claim to be the owner of the property described in his answer to the next foregoing interrogatory. The right by which he claims to be the owner is derived from the fact that he purchased the same and paid therefor a full and adequate consideration, and the chain of title by which he holds the same is fully and particularly set forth in his answer to the complainant's bill of complaint.

In reply to the third interrogatory he answers: That with due respect to the order of the court in the premises, he declines making any statement of the rents and revenues of said property, until it shall appear that the complainant is entitled to the rendition of an account thereof; that he hath held possession of said property since March 28, 1838, and those under whom he claims have with him had and held open, public, and notorious possession since August, in the year eighteen hundred and one, when said property was sold by the Spanish government for the benefit of the city of New Orleans.

269 In reply to the fourth interrogatory he answers. No; that he has not.

(Signed) DOMINIQUE LANATA.

Sworn to and subscribed before me this 4th April, 1857.

(Signed) J. W. GURLEY,
U. S. Comm'r.

And now the said defendant Henry E. Lameyer, for this his separate answer to the interrogatories propounded to the defendants by the complaint as a part of her bill, answers and says:

In reply to the first interrogatory he answers: That so much of the property mentioned and described in the complainant's bill of complaint in the second division of her description of property, as a piece forming a square of 127 feet, at the corner of Toulouse & Burgundy streets, and more particularly described in the answer of this defendant as claimed by him, was a part and portion of the estate of Daniel Clark at the time of his decease, subject, however, to an incumbrance, to wit, the
270 capital sum of eighteen hundred and twenty dollars, in favor of the corporation of New Orleans, and secured by a perpetual ground rent of 5 per centum per annum perpetually.

In answer to the second interrogatory he answers: That he does claim to be the owner of a portion of the property described in plaintiff's bill; that portion which he claims to be the owner of, is a lot of ground at the corner of Toulouse and Burgundy streets, being the north corner of said streets, and measuring 120 feet front on Toulouse street by 120 feet deep and front on Burgundy street, French measure, (the measurement stated in answer to 1st interrogatory being English measure,) and comprised within the square bounded by Burgundy, Toulouse, Rampart, and St. Peter streets. The right by which he claims ownership is that derived from the fact that he purchased the same and paid therefor a full and adequate consideration, and the chain of title by which he holds the same is fully and particularly set forth in his answer to the complainant's bill.

271 In reply to the third interrogatory he answers: That the property by him claimed hath yielded a revenue, but not any regular annual amount; and, at times for years in succession since he owned it, hath yielded no revenue whatsoever, but hath, on the contrary, been an absolute and great loss to him in the loss of interest upon the capital invested, the payment of the annual ground-rent thereon, the payment of the city and State taxes, and the repairs necessary to the buildings thereon, with costs of taxes, insurance, costs of banquettes, and repairs to the same, and divers and sundry other charges on said property. He hath held personal possession of said property since the 30th of September, 1836; and those under whom he claims title, including Daniel Clark and his succession, to whose rights he hath succeeded, extend back to August, 1801, when said property was sold by the Spanish government for the use and benefit of the city of New Orleans; and
272 those under whom he claims, and to whose rights and possession he hath succeeded, have been in the actual, open, public, and notorious possession under title derived from the estate of Daniel Clark since the 29th of December, 1820, and since which time they have held it in opposition to all persons claiming under said succession; and that Mary Clark, under whom he claims, and to whose possession and rights he hath succeeded, was, in like manner, in open, notorious, and public possession of said property from the 13th day August, 1813, to the time of her sale, on the 29th December, 1820; and since the said 13th of August, 1813, this defendant, and those under whom he claims, hath held the said property in opposition to all persons whatsoever claiming said property, under title derived from Daniel Clark, other than that derived from Mary Clark as aforesaid.

And furthermore, answering, he saith he hath made no calcula-
273 tion of the annual rents and revenues derived from said property, and, (with all due respect to the hon. court,) he declines doing so,

unless so ordered to do especially by the court, after a decree determining that the complainant hath an interest in said property, and is entitled to an account.

In reply to the fourth interrogatory he answers in the negative—he hath not.

(Signed) E. H. LAMEYER.

Sworn to and subscribed before me this 4th April, 1857.

(Signed) J. W. GURLEY,
U. S. Comm'r.

And now, the said defendant The City of New Orleans, by Charles M. Waterman, the mayor thereof, for these her separate answers to the interrogatories propounded to the defendants by the complainant as a part of her bill, answering, saith:

In reply to the first interrogatory, answers: That other than the property described in the answer of The City of New Orleans to the
274 bill of complaint as derived by E. Blanc from Mary Clark, and subsequently sold to the city of New Orleans, this respondent knows nothing, and, as to the said described property, he answers in his official capacity that he believes that property did belong to the succession of Daniel Clark, and that, at the time of his death, he was seized thereof.

In reply to the second interrogatory, answers: That the defendant The City of New Orleans does claim to be the owner of a portion of the property described in the bill of complaint; that the only portion of said property now owned by said city of New Orleans, arises as follows: That the ancient corporation, of the mayor, aldermen, and inhabitants of the said city, having purchased a tract or piece of land adjoining the city from Evariste Blanc, as fully stated in the answer of this defendant The City of New Orleans, to the bill of complaint, did, or the first municipality of New New Orleans which succeeded to the rights of said ancient corporation in and to said lands
275 did, cause the same, with other property, to be laid out into squares and parts of squares as an elongation of the then rear part of the city, which had been previously laid out into squares and subdivided by streets, and that he hereto annexes a sketch of the entire property so laid out by the then corporate authority having jurisdiction over the same, and states that that portion of the same, and that only, which is embraced within the lines thereon drawn and marked by the letters A, B, C, D, E, F, G, H, I, K, & A, was derived, by said Blanc from the succession of Daniel Clark. That Daniel Clark never had any interest in any other part of the lands, squares, and parts of squares delineated on said sketch. That said part so embraced within said lines was duly and lawfully laid out into squares, and parts of squares, as shown on said sketch, and all those parts therein shown as being streets
276 and avenues, were and are dedicated to the public use as public streets in this city, and this defendant claims no other interest therein than being the trustee of the public, and the said parts being streets and avenues are not now claimed as private property, susceptible of alienation or to be recovered as such under any circumstances. And this affiant, answering for said defendant The City of New Orleans to said interrogatory, further saith that the whole of said squares of ground and parts of squares embraced within the lines aforesaid, were sold by the then municipal corporation having authority over the same, with the exception

stated below; that the sale thereof was made at public auction on two several occasions, to wit, 10th March, 1837, & 12th January, 1846, and the purchasers' names and the particular pieces purchased by each may be found by the complainant at or about said dates, recorded in the conveyance office of the parish of Orleans, as affiant presumes. That

277 the exceptions above referred to, that is, the portions of squares or lots embraced within the aforesaid lines, other than the streets and avenues, and not sold, but yet held and owned by the city of New Orleans, are the squares comprised between St. Peter st., Hagan avenue, Orleans st., and Lake road, as shown on said sketch, and on which the draining-machine for draining the city is located; and also four other squares, comprised between Dupre, Salcedo, St. Ann, and St. Peter streets, and which have been reserved from sale for a public place or square for the use of the public and withdrawn from commerce. The squares and parts of squares so stated, as not heretofore sold, is the only property described in complainant's bill of complaint, now owned or claimed by the defendant The City of New Orleans as private property. The defendant claims jurisdiction over said streets and avenues for municipal purposes only.

278 In reply to the third interrogatory he answers: That the property claimed by the defendant The City of New Orleans yields no revenue in any form; this defendant hath never derived any rent or revenue therefrom.

In reply to the fourth interrogatory he answers: That the defendant The City of New Orleans hath not sold or disposed of any of the property described in the bill of complaint, other than that which hath been sold as aforesaid, by the then corporate municipal authority claiming ownership thereof; and this defendant hath described the portion so sold.

(Signed) CHA'S M. WATERMAN,
Mayor.

Sworn to and subscribed before me this 4th April, 1857.
(Signed) J. W. GURLEY,
Clk & Comm'r.

The title of the city of New Orleans from Evariste Blanc.—Referred to in the statement of the master.

In the city of New Orleans, State of Louisiana, this 26th Sep-

279 tember, one thousand eight hundred and thirty-four, and the fifty-ninth year of American independence, before Felix de Armas, notary public, duly commisisoned for the city and parish of New Orleans, there residing, and in the presence of the undersigned witnesses, personally appeared Evariste Blanc, a resident of this parish, on the Bayou St. John, on the one part, and the Honorable Denis Prieur, mayor of the city of New Orleans, and in that quality acting in the name of the corporation of the mayor, aldermen, and citizens of this city, in virtue of two resolutions of the city council, of which certified copies are here annexed—the first of the thirtieth of July last, and approved the second of August, and the second of the thirteenth of September current, and approved the fifteenth of the same month—on the other part, who have acknowledged that, on the twelfth of July last, the said Evariste Blanc wrote a letter to the president and members of the city council, offering to sell to the said corporation his prop-

280 erty on the Bayou St. John, where he resides, containing about two hundred and forty superficial arpents, the original of which letter is here annexed for reference; that, by the said first resolution, the said honorable mayor was authorized to contract with the said Evariste Blanc for the acquisition of the land that he offers to sell, provided that the price does not exceed the sum of fifty thousand dollars, payable in the obligations of the corporation in thirty years from date, with interest at five per cent. per annum; that, on the ninth of August last, the said honorable mayor informed the council that he had concluded with Mr. Evariste Blanc in purchasing the property offered by the latter for the sum of forty-five thousand dollars, payable in thirty years in obligations of the corporations, bearing an annual interest of five per cent., the said interest payable every six months; that, at a sitting of the said council, on the thirteenth of September current, the said council unanimously resolved that the above-mentioned
281 acquisition, of which the mayor, at the sitting on the ninth of August, gave notice to the council, that is to say, conforming to the authorization bestowed upon him, he had concluded with Mr. Blanc in purchasing the property offered by him in his letter of the twelfth of July last for the sum of forty-five thousand dollars, payable in thirty years, in obligations of the corporation, bearing an annual interest of five per cent., the said interest payable every six months, is and remains approved, as well as the result of the said resolution of the thirteenth of September current. And in execution of the above, the said Evariste Blanc has, by these presents, sold, ceded, and conveyed, from the said day, the ninth of August last, and forever, all his warranty of right to the said corporation of Mayor, Aldermen, and Inhabitants of this City of New Orleans, represented by the said honorable mayor, who acts in virtue of the above resolutions, a lot and dwelling, situated in this parish of Orleans, of irregular form, having about eleven arpents,
282 fronting on the Bayou St. John, and bounded by the said bayou, the canal Carondelet, the road called the Bayou road, and D'Argenvis street, which land is, in total, about two hundred and forty superficial arpents, together with all the buildings, circumstances, and dependencies of the said land, without excepting or reserving anything.

The said Evariste Blanc declares that his right of property to the said dwelling is established as follows, to wit: By an act of the eighth of February, one thousand seven hundred and ninety-eight, before Francis Brontin, then a notary in this city, Mr. Louis A. Blanc bought of Mr. Andres Almonaster y Roxas a certain quantity of land of which portion of the land the object of these presents made a part. By an act of the thirteenth of April, one thousand eight hundred and sixteen, before Narcisse Brontin, then a notary in this city, the said Evariste Blanc bought of the said L. A. Blanc a portion of the land acquired by this last as also by the former. By an act of the first of May, one
283 thousand eight hundred and sixteen, before G. R. Stringer, then a notary in this city, the said Evariste Blanc sold to Mrs. Catherine Foster, wife of James Hersy, a portion of land purchased by the said Evariste Blanc of Mr. L. A. Blanc, but, by act of the first of May, one thousand eight hundred and twenty-five, before H. K. Gordon, then a notary in this city, the said Hersy resold to the said Evariste Blanc the portion of land he had sold to him. Mr. Nicholas Maria Vidal bought of Mr. L. A. Blanc a portion of the land that the latter had from Mr. Andres Almonaster y Roxas, and obtained the twenty-sixth of March, one thousand eight hundred, from the Spanish government, the concession of another portion of land adjoining that, also

purchased of Mr. L. A. Blanc. By an act of the twenty-fourth of July, one thousand eight hundred and four, before P're Pedesclaux, then a notary in this city, the said N. Maria Vidal sold to Mr. Daniel
284 Clark part of the land that belonged to him from the purchase from Mr. L. A. Blanc, and from the Spanish concession. And by an act of the thirtieth of October, one thousand eight hundred and one, before Ph'pe Pedesclaux, then a notary in this city, the said testamentary executors of the said Daniel Clark sold to the said Evariste Blanc a part of the land that the said Daniel Clark had purchased from Mr. Vidal, and in confirmation of the said declarations, they remit to the undersigned notary certified copies of the above-mentioned act from the original of the said Spanish concessions, as well as a plan prepared by Mr. Charles Laveau Trudeau the thirty-first day of March, eighteen hundred, which document, at the demands of the parties to the present, are hereto annexed for reference.

The present sale has been, and is now, made for and in consideration of the sum of forty-five *hundred* dollars which the honorable mayor obliges the corporation to pay to the said Evariste Blanc, his heirs and assigns, in thirty years, counting from the 15th of September,
285 current, with interest on the principal, at five per cent. per annum, payable semi-annually, to all the holders of the obligations hereafter or in proportion to the amount of the said obligations. And in order to facilitate the said Evariste Blanc in the negotiations of the said letters of credit, and also of others that have been granted to him, there is now furnished to the said Evariste Blanc, who acknowledges it, and of it gives receipt, forty-five obligations of the sum of one thousand dollars each, dated the 15th September, current, signed by the said honorable mayor, and countersigned by Mr. John Culbertson, recorder, and by Mr. J. M. Fleytas, treasurer; on the margin of which obligations are the coupons, payable, as is after mentioned, signed under the initial letters of the said treasurer, which obligations numbered from one to forty-five inclusive, the said vendor receives as a settlement, without reserve of privilege or hypothecation on the property now sold.

The certificate of the recorder of mortgages in this city, bearing date of this day, and here annexed, shows that there is no mort-
286 gage upon the above-mentioned property against the said vendor; the vendor conveys to the said corporation all his rights to the said property, all the rights that he holds from his authors and preceeding vendors of the same property, whatever may be his rights, warranty, or otherwise, placing and installing it in his stead and place by reason here accepted by the honorable mayor, who acknowledges the taking possession of the said property. At the same time appeared Madame Fanny Labatut, wife of the said Evariste Blanc, and by her said husband duly assisted and authorized to the effect, and for the full validity of these presents, who, after reading being made to her by the undersigned notary of the preceeding act, has declared that she approves it in all its contents, and having besides declared to the undersigned notary that it was her intention to renounce all the hypothecation privileges and other rights that she has or can have to the said land or habitation, the said notary has informed her that, according to the laws of this State, the wife has a tacit mortgage upon
287 the immovable effects of her husband—

I. For the restitution of her dowry or on account of the dispensation of her dotal effects that she brought at the time of her marriage, and this to count from the day of the celebration of said marriage.

II. For the restitution or for the dispensation of effects, dowry to which she would have acquired during marriage, whether by succession or donation, and that from the day the succession shall be opened in her favor, or from the day that the donation took effect.

III. For the payment of the debts that she may have contracted with her husband, as well as for the repayment of her own effects alienated from the day of the obligation, or from that of sale.

IV. For the security of the obligations imposed on the husband, in case where he may have enjoyed the parapherual effects of his wife, or for the reimbursement of their price in the case where they may have been alienated by the wife with his consent, and he received the
288 money, or was otherwise profitted by it.

And the said Madame Blanc, acknowledging herself to be perfectly instructed in the rights that the law accords to her on the effects of her husband, said and declared that she persists, notwithstanding, in the instruction that she has heretofore manifested, and that of her own full will, and of her own wish, she formally renounces by these presents, as well for herself as for her heirs and assigns, every hypothecation, legal or tacit, that the laws give her or can give to her on the land or dwelling that is the object of these presents, whether these rights may have inured to her by title or dowry, or from paraphernal effects, and that she cedes and conveys to the corporation of the mayor, aldermen, and citizens of the city of New Orleans or its assigns, all the above-mentioned rights and others, whatever they may be, installing the said corporation in her stead and place by reason of them, and authorizing it to prevail against herself as much in justice as out
289 of it. This accepted by the said honorable mayor, and—

Done and passed in my office, the day and month aforesaid in presence of Messrs. Alphonse Morel, and Amedee Ducatel, competent witnesses, who, in common with the parties and notary, have affixed their signatures after reading made.

(Signed) EVARISTE BLANC.
" LABATUT BLANC.
" D. PRIEUR, *Mayor.*

(Signed) AMEDEE DUCATEL.
" A. MOREL.
(Signed) FELIX DE AMAS, *Not. Pub.*
(Signed) G. EUSTIS.

290 *Report of master in chancery.—Filed May* 12, 1871.

Circuit court of the United States, fifth circuit and district of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

To the honorable the judge of the circuit court of the United States for the fifth circuit and district of Louisiana:

In the report which I had the honor to present in this cause on the day of last, allusion was made to the fact that the complainant, Mrs. Gaines, had presented a claim for timber and wood taken by defendant from the land decreed to her, but that no evidence of the amount or value had been submitted to me.

On the 1st of May of the present year, Mrs. Gaines made application to me to hear testimony to substantiate her claim, and, after
291 giving due notice to the counsel representing the defendant, I proceeded, on the 3d day of that month, to take the depositions which are herewith transmitted to the honorable court. It is proved that the land decreed to complainant, was at the time defendant obtained possession, swampy and partially covered with cypress and gum trees. As I am advised, these five blocks comprise six superficial acres of land, which one of the witnesses, W. H. Wilder, estimates must have contained 600 trees, worth two dollars ($2.00) each, and *and* 150 cords of wood, worth 2.50 per cord, making an aggregate of $1,575.00.

Mr. Wilder has only known the premises since 1842, and at that time most of the trees had been removed. The other witnesses are older residents of the city, and well acquainted with its condition when defendant acquired possession, but none of them attempt to estimate the value or quantity of the wood upon it. It is proper to remark that there is no evidence before me that the defendant either cut
292 or converted to his own use and of the timber or wood on said land, but as he held the possession, and from its swampy character the land was valueless until cleared off, it is fair to assume that the removal of it was done by his authority.

Respectfully submitted to the honorable court.

(Signed) JOHN B. WELLER,
Master in Chancery.

NEW ORLEANS, 12*th May*, 1871.

Evidence annexed to above report.—Filed May 12, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

Present, Myra Clark Gaines in person.

JOSEPH BEAULIEU sworn:

I am acquainted with the property of Mrs. Gaines. I remember it was covered with wood. I cannot tell the value of the wood a cord. It was cypress and gum wood.

(Signed) J'S BEAULIEU.

293 Sworn to and subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER,
U. S. Comm'r.

JOHN ARROWSMITH sworn:

I am acquainted with the property in the vicinity of the Orleans draining-machine. In 1833, when I first knew it, it was swampy. I have known it ever since. It was swampy land with shrubs on it; there were trees, but they were scattered here and there.

(Signed) JOHN ARROWSMITH.

Sworn to and subscribed this 3d May, 1871.

(Signed) JNO. B. WELLER.
U. S. Comm'r.

JOSEPH JOUBERT sworn:

I am acquainted with the property in the vicinity of the Orleans

draining-machine. I knew the place to be a woodland. It was mixed wood, cypress and gum, and was worth ($4) four dollars per cord when cut. It was covered with wood, but I cannot say how many cords.

(Signed) J. JOUBERT.

Sworn to & subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER.
U. S. Comm'r.

294 JOSEPH KLAR sworn:

I am acquainted with the property in the vicinity of the Orleans draining-machine since the year 1820. It was swamp land; had plenty of wood on it—covered with wood. I do not know that the wood was good. I know it was bad wood; it was mixed. It might be worth about two or three dollars per cord.

(Signed) his JOSEPH + KLAR. mark.

Sworn to and subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER,
U. S. Comm'r.

LEON TERREGOSSE sworn:

I am acquainted with the Blanc tract. There was wood on it but it was bad. It was mixed with cypress and gum wood. It was worth then about $2 or $3 per cord. There was a great deal of latanier. I have no idea of the number of cords; never having seen it cut down, I cannot tell.

his LEON + TERREGOSSE. mark.

Sworn to & subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER,
U. S. Comm'r.

295 J. M. FLEITAS sworn:

I am acquainted with the Blanc tract. It was covered with all kinds of wood, cypress and gum wood. I do not know what it was worth a cord. I only knew it as a young man when I went hunting through it. I cannot recollect in what year it was covered with wood. I bought a tract of land near this tract, and it was covered with wood, and all the land around it was covered with wood. This was in the year 1824.

(Signed) J. M. FLEITAS.

Sworn to and subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER,
U. S. Comm'r.

A. D. DORIOCOURT sworn:

I am acquainted with the Blanc tract. I recollect that all the lands in the rear of the city, beginning with Claiborne street to the Bayou St. John was covered with wood; the stumps still exist. To the best of my recollection, they commenced to cut the timber when the

296 1st draining-machine was built; some may have been cut before. Between 1825 & 1830 it was so thick and swampy that I could not cross from canal Carondelet to Bayou road in the direction of Galvez street, on account of the timber and water. I cannot say what the wood was worth a cord, as I was too young at that time. It might have been worth two or three dollars per cord. The timber was only on the swamp land.

(Signed) A. D. DORIOCOURT.

Sworn to and subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER,
U. S. Comm'r.

W. H. WILDER sworn:

I have surveyed what is known as the Blanc tract. It contains 135 superficial acres. I have known it only since 1842. At that time there was but little timber on it. It is my opinion that there are 400 cypress trees to an acre; the average is 100 trees fit for lumber to the
297 acre. I am speaking as an engineer. The number of cords of wood to an acre is 100. I would place 25 to be the amount, the minimum. I would consider this a low amount. A mercantile cypress tree, standing, is worth $2; wood such as this was worth about $2.50 per cord in 1843; that is the price I paid for it.

(Signed) W. H. WILDER.

Sworn to and subscribed this 3d May, 1871.

(Signed) JOHN B. WELLER,
U. S. Comm'r.

Entry at rules.—Extract from the chancery order docket, June rules, 1871, Monday, 5th.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

The master in chancery to whom this cause was referred with directions to take an account between the parties, of the yearly rents
298 and profits of certain property, &c., has, on the 12th day of May, 1871, reported upon the claim presented by the complainant for timber and wood taken by defendant from the land decreed to her, and filed said report on the said 12th May, 1871.

Order.—Exceptions to master's report fixed.—Extract from the minutes of Monday, June 5, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS & AL. } No. 2695.

Ordered that the exceptions to the master's reports be argued on tomorrow at 11 a. m.

Submission of exceptions to master's reports.—Extract from the minutes of Tuesday, June 6, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

299 MYRA CLARK GAINES
vs.
LIZARDI & ALS. } No. 2734.

The exceptions to the master's reports in above cases were called—
Present, Race, Foster & E. T. Merrick; Fellows & Mills, J. McConnell, Miles Taylor, Hyanes & Jonas—
And, after hearing argument the court took time to advise.

Copy of opinion of the court as to exceptions to master's report.—Delivered June 9, 1871.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS AND OTHERS.

On bill in equity and decree, &c., on exceptions to master's report.

MYRA CLARK GAINES
vs.
MANUEL J. LIZARDI & ALS.

Same circumstances.

300 In these cases the defendants except to the master's report. It does not appear, by the report or the master's minutes, that the exceptions were taken before him. The rule of practice is that no exceptions will be heard by the court which have not been made before the master, so as to give him an opportunity of considering the same and correcting his report. But as counsel on both sides have evidently acted under a misapprehension of the rule, I will not overrule the exceptions on that ground, especially as some of them are of great importance to the rights of the parties. But it is desirable that the rule should be observed, and hereafter in the absence of very special circumstances the court will feel bound to enforce it. It was declared by the Supreme Court of United States, in the case of 18th How., and in other cases then referred to.

The principal exceptions are:

1. That the defendants did not realize the rents and profits,
301 which the master has charged them with. As this is a matter of fact arising upon the evidence, the court will not undertake to re-examine and retry the whole case; but will allow the report to stand, unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based. It must be remembered that where the possession is in bad faith, the possessor will not only be charged with what he has received, but with what he might have received; in other words with the worth or value of the property.

The case of the city will be adverted to more particularly hereafter.

2. It is excepted, secondly:

That the master has not allowed the defendants the prescription of three years for rents and profits received by them, before the commencement of the suit. In this the master only followed the decree.

302 The Supreme Court of the United States decided that the defendants were possessors in bad faith, chargeable with notice of the defectiveness of their title, and that they must severally account to the complainant for the rents and profits received by them, from the time that they severally came into possession; and, being possessors in bad faith, I think, by the law of Louisiana, they cannot claim the benefit of prescription with regard to rents and profits any more than with regard to the land itself. There are repeated decisions to this effect, some of which are referred to in 2d Hennen's Dig., tit. possessions II *a*, p. 1195, No. 5. And Touillier says: "Bad faith renders him (the possessor) liable to account for not only the fruits which he has received, but even those which he might have received, and which have perished by his negligence; and this obligation is extinguished only by the prescription of the thing itself; and restitution is due from the day when the

303 bad faith commenced. (Droit Civile Francaise, vol. 3, pp. 71, 72. Mackeldey says the same thing in effect.

The defendants' counsel have referred me to a provision of the code of 1808, which declares that the prescription of 30 years may be pleaded even by a knavish possessor. Precisely the same provision is found in article 3438 of the present code, only a little differently rendered in English. It reads thus: "The same species of property is prescribed for by 30 years, without any title on the part of the possessor, or whether he be in good faith or not."

The species of property referred to is immovables.

It is a sufficient answer to the argument derived from this article to say that it was not overlooked by the Supreme Court of the United States, and that its rejection as applied to this case is res judicata. And it is hardly necessary to remind the defendants, that if Mrs. Gaines did not arrive at full age until 31st December, 1827, as alleged in the bill, the 30 years had not expired when the bill was filed, letting alone

304 the previous litigation of many years which had interrupted the prescription.

3. The defendants except, thirdly: Because the master charges them with the rents and profits of the buildings and improvements, as well as of the land in its original state as owned by Daniel Clark. They claim that they are entitled to the use of the improvements, whether erected by themselves or by their predecessors in possession, and are liable to the complainant only for the use of the lands as Daniel Clark left it.

This objection involves the general question of the defendant's right to compensation for improvements and the extent thereof and exceptions thereto. Generally speaking, according to article 500 of the present code, which is identical with the corresponding article in the code of 1808, and with article 555 of the Code Napoleon, when plantations, constructions, and works have been made by a third person,

305 with his own materials, the owner of the soil has the right to keep them, or to compel the author to take away or demolish them. If he keeps them he must pay for the value of the materials and the price of the labor. In other words, he must pay for their original cost. From the moment he approves of and accepts the improvements, he is regarded as having ordered them. (Locré, vol. 8, p. 181.)

This rule is a modification of the Roman law, which made a distinction between necessary and useful works. If necessary to the preservation of the property, the possessor in bad as well as in good faith was entitled to compensation; but if useful only, whilst the latter was entitled to reimbursements, the former had only the right to withdraw and keep the gain which he had derived from the improvements. The Roman rule seems to be adopted in this State, in the case of improvements which cannot be separated from the property, and cannot, therefore, according article 500, be removed at the owner's option,
306 such as the clearing of wild land and rendering it fit for cultivation. In such cases the possessor is permitted to retire with the profits he may have made, but without any claim of compensation, for his labor. (Gibson vs. Hutchins, 12th Annual, 547, overruling the previous case of Pearce vs. Fantum, 12 La., 422.)

The supreme court of this State seems also to have established another exception to the general rule laid down in the code, namely, that a possessor, knowing that he has no title, that is a mere tresspasser or intermeddler, is not entitled to any compensation for improvements. This was held in the case of Herriôt & al. vs. Broussard, 4th Martin, N. S., 267. The court say "The defendant's claim for remuneration on account of ameliorations or improvements on the disputed premises was properly rejected by the court below. He is not one of those possessors to whom our laws accord such a right; he knew that
307 he held no title, for he did not accept that intended to be conveyed, &c."

The same doctrine is laid down in Gibson v. Hutchins, 12th Annual, 547. Referring to a previous case not reported, the court say: We said in Hemkin v. Overley, that we are unable to recognize the doctrine that one who makes improvements upon property to which he knows he has no title, has any legal or equitable claim to reimbursement for such improvements."

The court applies the doctrine to the case of a settler, who takes possession with the hope of a pre-emption. "Until he actually makes his entry he knows he has no title. He has an expectancy and nothing more. He is a tenant by sufferance. * * When the Government parts with the title to a third person, that title carries with it such inseparable ameliorations as the land may have received from the settler. The settler has no claim upon the owner. Of course the possessor who knows he has no title is a possessor in bad faith."

308 A subsequent case to that of Gibson v. Hutchins, Cannon v. White, reported in 16 Annual, 85–91, leaves us in some uncertainty as to the true distinctions to be made on this subject. The defendant in that case had reason to suspect his grantor's title, (which was a fraudulent one,) and was held to be a possessor in bad faith. He went into possession in 1853, when only 250 acres of the land was under cultivation. He remained in possession 8 years, and made and erected improvements valued at $5,250. The court considered that the use of the 230 acres of additional clearing and the cord wood consumed, more than compensated for the expense of clearing, and set off one against the other. But they allowed him compensation for his other improvements. In other words, he was allowed for his inseparable improvements (the additional clearing) only what he was able to realize therefrom, in accordance with the doctrine of Gibson V. Hutchins, and for his constructions he was allowed cost.

309 In the cases before us the bill charges and the decree declares that the defendants purchased with full notice that the auction sale

of Relf and Chew were illegal, null and void, and in fraud of the rights of complainant, and the defendants are decreed to surrender the property to the complainant forthwith and to account to her for all the rents and profits from the time they came into possession. No deduction or limitation is mentioned, except this, that the account should be taken subject to the laws of Louisiana in cases of such recovery. The fair interpretation of this limitation is, that these laws are to determine what elements go to make up rents and profits, and what are the proper allowances to be made in estimating the same under judgments or decrees of this kind.

How is this limitation to be applied in this case?

The bill prayed possession of the property and an account and payment of all the rents and profits. The decree grants both without
310 restriction. The defendants, in their answers, did not ask for any deduction or allowance for improvements. They placed themselves altogether upon their title and the invalidity of the complainant's title. They defended the title only. Nothing was said about improvements; and even when they came before the master no statement in writing is made setting up any such claim. The defendants, if they relied on such a claim, ought to have presented to the master a statement of facts in writing setting forth their claim, and forming a basis for revisory action, if proper, on the part of the court. The claim of the defendants is full of embarras'ments. Nevertheless, on account of neglect of the proper forms of presentation, if they are really entitled to compensation for improvements under the law of Louisiana, and if that subject has never been considered by the Supreme Court, it would be very hard to conclude them by the mere forms of law. The Supreme Court has expressly decreed that the complainant should have
311 immediate possession of the disputed property. The claim for improvements, therefore, if it exists at all, cannot interfere with the surrender of possession. It must either be adjusted in the account for rents and profits or by a subsequent proceeding. A subsequent proceeding would be intolerable on account of the increase and protraction of the litigation that would ensue. The clause of the decree above referred to, requiring the account to be taken subject to the laws of Louisiana, opens a way for the adjustment of this question before the master, upon proper proceedings to be had on the part of the defendants.

Upon a carefel examination of the law, I am of the opinion that the defendants, were it not for the difficulties presented by the pleadings, would be entitled to compensation for their improvements erected on the land. And as the question seems never to have been presented to the Supreme Court for adjudication, the want of a decree for such compensation is not necessarily to be regarded as res judicata against the
312 claim. And although the fact that the defendants have never formally set up such a claim in their answers or in any proceeding in the case presents a strong barrier to its allowance, and although it may be a great stretch of indulgence on the part of the court to allow it to be set up at this time, still the court may avail itself of that clause of the decree which directs the accounts of rents and profits to be taken, subject to the laws of Louisiana, as a basis for its allowance before the master on a proper presentation of the facts before him. But the defendants are in gross laches, and as a condition of referring the cases or any of them back to the master for this purpose they must first severally pay the costs of the proceedings already had before the master; and when any case comes up before him, the defend-

ant concerned must present a written statement of the facts on which he bases his claim together with a statement of the cost of the improvements claimed, in order that the complainant may then elect
313 within thirty days from the master's report thereon, whether she will keep the improvements, or have them removed at the expense of the defendant. Her election should not be regarded as made by reason of her taking possession of the property with the improvements on it, because no proper claim for improvements has ever been made in the cause. And the presentation of the claim under oath is not to be regarded as superseding due proof thereof. Of course the statement should show when the improvements were erected, and by whom, and if not erected by the defendant, that he purchased the same with the property. Where the grantor and grantee are both parties to the cause, the supreme court of this State has decided that the improvements should be apportioned between the grantor and grantee in proportion to the improvements made by each.

Lejeune v. Barrow. 11th Ann., 501.

But that will depend on the fact whether the grantee has or has not paid for them, and does or does not look to his grantor for indemnity.

314 In taking this account I consider the decree of the Supreme Court as requiring, and the law of the case to be, that the entire rents and profits are to be accounted for by the defendants. As the accounts have already been taken by the master on this basis with due allowances for all ordinary expenses for repairs, insurance, taxes, &c., that part of the work will not require to be repeated.

The case of the city is a peculiar one. The estimation of the rents and profits in that case is so uncertain and speculative, that I do not feel entirely satisfied as to the decision that should be made. The master evidently felt the same embar'assment. He says: "As the city received no rents whatever and no profits, except by the increase of its revenue, it is difficult to fix the amount to which she (the complainant) is justly entitled. The master presents facts and figures which
315 he trusts will enable the court to arrive at an equitable conclusion." He then gives the estimate of various witnesses as to the annual value of the premises including the draining-machine, the average of which was $8,000; and, after deducting the cost of the machine and all improvements and repairs, he brings the city in debt the sum of half a million dollars ($500,000.) Another estimate based on the additional revenues derived from the lands reclaimed by the use of the machine after deducting cost and repairs, shows a profit of two hundred and eight thousand eight hundred and twenty-five dollars ($208,825.) Both of these estimates are vague, uncertain, and somewhat speculative.

A third estimate is made based on the value of the land and buildings without the drainage-machine, and giving credit for ordinary repairs to the buildings, independent of the machine. This makes the rents $157,600, and the repairs $32,333.21, leaving a balance of $125,267.79. As the master has not signified his adoption of either of these estimates, but has stated the facts to the court for its equitable de-
316 termination, I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the drainage-machine for the past 35 years against the cost of constructions and repairs, and to charge the city with the rents of the building and land, less the ordinary repairs of the buildings, amounting as shown by the report to the sum of $125,267.77. Whilst the profits and advan-

tages of the drainage-machine were indefinite and uncertain in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to re-imburse the city for all its expenditures, including even the rent with which it is charged.

A decree will be made confirming the report of the master in the case of The City of New Orleans upon the basis of the last alternative stated in his report; and also confirming his several reports in the other cases as far as they have gone, with leave however to each of
317 the defendants in the other cases, upon payment of the master's costs respectively to have a further reference to the master for estimating the compensation due to them for improvements, upon the terms and principles above stated in this opinion.

CLERK'S OFFICE.

A true copy of the original.
New Orleans, June 9, 1871.
(Signed)

D. URBAN, *Clerk.*
By F. B. VINOT,
D'y Clk.

Motion for a rehearing.—Filed June 10th, 1871.

In the circuit court of the United States, district of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

On motion of M. Taylor and J. McConnell, solicitors of the defendants in the above entitled suit, and on suggesting that there is error to the prejudice of The City of New Orleans in the judgment herein rendered on the 9th inst., on the exceptions taken and made by said de-
318 fendant to the report made herein by Jno. B. Weller, master.

It is ordered by the court that the said complainant, Myra Clark Gaines, do shew cause, on the 10th day of June, 1871, at 12 o'clock m., why a rehearing and new trial herein should not be granted, and the report of the said master rejected, or remanded to him for correction and revision in accordance with the written exceptions filed thereto by said defendant, upon the following grounds, to wit:

I. Because the court erred in condemning the said defendant The City of New Orleans to pay complainant the sum of one hundred and twenty-five thousand dollars, as allowed by said master's report.

That, according to the reasoning in the opinion rendered by the court, and the authorities cited by the court, the utmost limit of liability of the said city should not have exceeded the loss of the works and improvements erected by the city upon the said land out of the public funds.

II. Because the said defendant The City of New Orleans
319 should have been protected in the right secured by law of retaining possession and ownership of the works and improvements, and draining-machine erected upon said land, until said complainant had discharged the legal obligations resting upon her to reimburse to defendant their value and price of workmanship, or require their removal, at the election of complainant, which the law required her to make.

III. That the court erred in not finding and declaring to be the law upon this subject, as expressed in article 500 of the Civil Code of the State of Louisiana, as interpreted by the supreme court of the State in the case of Canon v. White, 16th Annual Reports, page 85, because that opinion, the latest in date, rendered by said State supreme court upon the subject, should govern this court as a rule of construction under the settled jurisprudence of the United States.

IV. The court erred in not allowing the defendant the benefit of the prescription of three years against the claim of complainant
320 for rents.

V. Because the allowance made by the said master of one hundred and twenty-five thousand *thousand* dollars, and approved by this hon. court, was purely speculative and unsupported either by law or proof, was specially excepted to, and should have been wholly disallowed.

That the proof introduced shows that The City of New Orleans never received any rent, income, nor remuneration whatsoever from the use of said property, or the buildings or draining-machine thereon, either directly or indirectly, by taxation or otherwise, but that, on the contrary, the said city had actually paid out the sum one hundred and sixty thousand dollars to erect said buildings and machine, and run the same.

VI. Because it is fully proved that said half square of land was bought by said city from E. Blanc, in 1834, under a title by public act, which, upon its face and by its terms, were translative of prop-
321 erty; that, being in possession under such a title, the said ½ sq. of land was appropriated and dedicated to public use and withdrawn from commerce by said city, and the said buildings and draining-machine erected thereon solely for the public benefit and advantage; that, from that period, the said land, and buildings, and works thereon ceased to be private property, or liable to seizure, or the subject of private ownership, being dedicated to the use of the public.

VII. That the said master's report herein filed should be rejected altogether or returned to him for correction in accordance with the exceptions filed thereto, because the points and objections afterwards more fully stated in the within exceptions thereto filed, were made before said master at the time the trial was progressing before said master, and were disallowed by him contrary to law; that the said master failed and refused to note in his report, as he was requested to do by
322 the counsel for the defendant, a note of points and authorities that were cited to him; and defendant enumerates, specially among other points so made, the protection accorded to possessors in bad faith under article 500 of the Civil Code as settled by the case of , (16th Annual Reports, page 85, and that, by the terms of said article 500, the complainant, as owner, should elect whether she would retain and pay for the value of the materials erected upon said land, and the price of workmanship, or require the removal of the same; and the complainant being present, but unrepresented by counsel, the defendant, by its counsel, stated to the master that he called upon the complainant through him, to make the said election required by article 500 of the said Civil Code.

That defendant's counsel specially offered in evidence before said master, among other testimony, a copy of the title to the land in question, purchased by said city from E. Blanc, by act before
323 , notary public, dated , 1834, and also the answer of The City of New Orleans in the case of said

complainant against said city in this court, No. 2695, together with the answers of the mayor thereof attached and duly attested, for the purpose of establishing the points made before the said master, and afterwards put in more formal shape by written exceptions, as required by the 83d rule of equity practice; but the said master refused to receive or note said testimony as being so offered, and respondent made special objection thereto.

VIII. Because the proof shows that the tract of land containing one hundred and thirty-five acres, and of which the half square in question formed a part, and claimed by the complainant herein was reclaimed from the condition of an impassable and uninhabitable swamp by the action of said city by the erection of said draining-machine and otherwise, all at the cost, and by which the said property claimed by complainant has been greatly benefitted and for which said complain-
324 ant has never been taxed or contributed any portion of the expense whatever, to the said city.

IX. Because the court erred in treating the said defendant The City of New Orleans as a mere tresspasser, without any title whatever.

X. Because the judgment of the court was contrary to law and to the evidence.

J. McConnell, being first duly sworn, deposes that he is one of the counsel of record for The City of New Orleans, that the foregoing motion is not made for delay, but in the interest of the ends of justice, that the grounds assigned therefore are, in his opinion, well founded in law, and that the facts as stated above with reference to the proceedings had on the trial before the master in chancery, by whom the said report was made herein are correct and true.

(Signed) J. McCONNELL.

Sworn to and subscribed at New Orleans, this 10th day of June, 1871, before me.

(Signed) D. URBAN, *U. S. Comm'r.*

325 *Submission of motion for rehearing.—Extract from the minutes of Saturday, June* 10, 1871.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 2695.

The court having, on the 9th instant, delivered its opinion on the exception to the master's report, and directed the attorneys to submit a decree based upon the principles laid down in the opinion, the attorneys for complainant this day presented a draft of such decree for the sanction of the court; to which defendants objected and moved for a rehearing. Whereupon, after hearing the evidence and argument, the court took time to advise and directed that the master's statement be made a part of his report.

Draft of decree referred to in the foregoing submission.

U. S. circuit court.

MYRA CLARK GAINES
326 *vs.* } No. 2695.
THE CITY OF NEW ORLEANS & ALS.

This cause came on further to be heard upon the exceptions to the

master's report, made under the decree in this case as entered in this court, on the 11th day of June, 1870, against the said City of New Orleans, and the case was argued by counsel; and thereupon, on consideration thereof, it was ordered, adjudged, and decreed that the master's report on the basis of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars, ($125,266.79) for the net rents and profits, considering all improvements as compensated for by the profits and advantages of the draining-machine, be confirmed and approved; and, setting off all other profits derived by the city of New Orleans from the drainage-machine against the cost of construction and repairs made by the city, it is therefore ordered that the complainant, Myra Clark Gaines, is entitled
327 to recover and have, and she is hereby decreed to receive and have, from the said City of New Orleans for the said net rents, profits, and revenues of the said property ordered by the decree of this court to belong to and to be delivered to her, the said complainant, the sum of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars, ($125,266.79,) for the period said property has been in the possession of said city of New Orleans, with five per cent. per annum interest on eighty-four thousand eight hundred dollars, ($84,800,) from the date named in said master's report, to wit, the 1st of November, 1870, until paid; and that the said city of New Orleans pay the costs of suit; and that a writ of execution issue in the form used in the circuit court in suits at common law in actions of assumpsit.

328 *Order.—Rehearing refused.—Extract from the minutes of Monday, June 12, 1871.*

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

For reasons orally assigned, it is ordered that a rehearing be refused with costs.

Decree on master's report.—Extract from the decree docket.

United States circuit court, fifth circuit and district of Louisiana. April term, 1871.

NEW ORLEANS, *Monday, June* 12, 1871.

Court met pursuant to adjournment. Present, Hon. J. P. Bradley, associate justice of the Supreme Court, presiding. Present, Hon W. B. Woods, circuit judge.

329 MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS & AL. } No. 2695.

This cause came on further to be heard upon the exceptions to the master's report, made under the decree in this case as entered in this court, on the 11th day of June, 1870, against the said City of New Orleans, and the case was argued by counsel; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed that the master's report on the basis of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars, ($125,266.79,) for the net rents and profits, considering all improvements as compensated for by the profits and advantages of

the drainage-machine, be confirmed and approved; and, setting off all other profits derived by the city of New Orleans from the drainage-machine against the cost of construction and repairs made by the city, it is therefore ordered that the complainant, Myra Clark Gaines, is entitled to recover and have, and she is hereby decreed to receive and
330 have, from the said City of New Orleans for the said nett rents, profits, and revenues, of the said property ordered by the decree of this court to belong to and to be delivered to her, the said complainant, the sum of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars, ($125,266.79,) for the period said property has been in the possession of said city of New Orleans, with five per cent. per annum interest on eighty-four thousand eight hundred dollars, ($84,800.00,) from the date named in said master's report, to wit, the 1st of November, 1870, until paid; and that the said city of New Orleans pay the costs of suit; and that a writ of execution issue in the form used in the circuit courts in suits at common law in actions of assumpsit.

Decree rendered June 12, 1871.

Decree signed June 13, 1871.

(Signed) JOSEPH P. BRADLEY,
Associate Justice of Sup. C't U. S.

331 *Petition for appeal.—Filed June* 17, 1871.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

To the honorable the judges of the circuit court of the United States, fifth circuit and district of Louisiana:

The petition of The City of New Orleans, defendant in the above entitled and numbered cause, respectfully shows: That she is aggrieved by the final decree herein rendered on the 12th and signed on the 13th of June, 1871, against her and in favor of complainant, Myra Clark Gaines. That this appearer is informed and believes that there is error to her prejudice therein; that the said judgment is contrary to law and to the evidence adduced, and that the amount in controversy largely exceeds the sum of ten thousand dollars.

Wherefore petitioner, The City of New Orleans, prays for an order granting an appeal herein which shall operate as a supersedeas,
332 upon petitioner giving bond in the sum of two hundred thousand dollars, as fixed by this honorable court, said bond to be filed within ten days from the signing of said decree, and that this appeal be made returnable to the Supreme Court of the United States on the first Monday of December, 1871.

And petitioner prays that a copy of the appeal be lodged for the complainant in the clerk's office, where the record remains, and that said complainant be duly cited to appear and answer this appeal, and for all general and equitable relief.

(Signed) MILES TAYLOR,
(") J. McCONNELL,
Solicitors for City of New Orleans.

Order on above petition.

An appeal, to operate as a supersedeas, is allowed in this case as prayed for, and according to law, returnable to the Supreme Court of

the United States the 1st Monday of December next, the appellants giving bond in the sum of two hundred thousand dollars with
333 sureties according to law.

June 17, 1871.

(Signed) W. B. WOODS,
Judge U. S. Circuit Court for 5th Circuit & Dist. of Louisiana.

Copy of petition and order for appeal lodged for complainant in the clerk's office and filed June 17, 1871.

MYRA CLARK GAINES
vs. } No. 2695.
CITY OF NEW ORLEANS.

To the honorable the judges of the circuit court of the United States, fifth circuit and district of Louisiana:

The petition of The City of New Orleans, defendant in the above-entitled and numbered cause, respectfully shows: That she is aggrieved by the final decree herein rendered on the 12th and signed on the 13th of June, 1871, against her and in favor of complainant, Myra Clark Gaines. That this appearer is informed and believes that there
334 is error to her prejudice therein; that the said judgment is contrary to law and to the evidence adduced, and that the amount in controversy largely exceeds the sum of ten thousand dollars.

Wherefore petitioner, the City of New Orleans, prays for an order granting an appeal herein, which shall operate as a supersedeas, upon petitioner's giving bond in the sum of two hundred thousand dollars, as fixed by this honorable court, said bond to be filed within ten days from the signing of said decree, and that this appeal be made returnable to the Supreme Court of the United States on the first Monday of December, 1871. And petitioner prays that a copy of the appeal be lodged for the complainant in the clerk's office, where the record remains, and that said complainant be duly cited to appear and answer this appeal, and for all general and equitable relief.

(Signed) MILES TAYLOR,
(") J. McCONNELL,
Solicitors for City of New Orleans.

335 An appeal, to operate as a supersedeas, is allowed in this case, as prayed for, and according to law, returnable to the Supreme Court of the U. S. the 1st Monday of December next, the appellants giving bond in the sum of two hundred thousand dollars, with sureties, according to law.

June 17, 1871.

(Signed) W. B. WOODS,
Judge U. S. Circuit Court for 5th Circuit and Dist. of Louisiana.

CLERK'S OFFICE.

A true copy of the original on file.
New Orleans, June 17, 1871.

(Signed) F. B. VINOT, *D'y Cl'k.*

Endorsement on foregoing petition & order.

Copy of petition and order for appeal lodged for the complainant, Myra Clark Gaines, in the clerk's office, and filed June 17, 1871.

(Signed) F. B. VINOT, *D'y Cl'k.*

Bond for appeal.—Filed June 17, 1871.

U. S. circuit court.

336 MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 2695.

Know all men by these presents that we, The City of New Orleans, herein represented by B. F. Flanders, mayor of the said city of New Orleans, as principal, and Samuel Smith, James E. Zunts, C. H. Slocomb, J. L. Gubernator, C. Roselius, Hugh McCloskey, C. T. Howard, W. B. Schmidt, and M. Carvin are held and firmly bound, jointly and severally, unto Myra Clark Gaines, in the sum of two hundred thousand dollars, lawful money of the United States of America, to be paid to the said Myra Clark Gaines, her heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the seventeenth day of June, in the year of our Lord eighteen hundred and seventy-one.

Whereas the said City of New Orleans has this day presented
337 a petition to the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, praying for an appeal from a final decree rendered on the 12th and signed on the 13th of June, 1871, in the suit entitled Myra Clark Gaines vs. The City of New Orleans et al., No. 2695 on the docket of the circuit court of the United States for the district of Louisiana:

Now, the condition of the above obligation is, that we, the above-bounden City of New Orleans, and Samuel Smith, James E. Zunts, C. H. Slocomb, J. L. Gubernator, C. Roselius, Hugh McCloskey, C. T. Howard, W. B. Schmidt, and M. Carvin will well and truly pay to the said Myra Clark Gaines, the defendant in said appeal, all such damages as she may recover against us in case it should be decided that the said appeal was wrongfully obtained.

(Signed) BENJ. F. FLANDERS, [L. S.]
Mayor of City of New Orleans.

(Signed) SAM. SMITH. [L. S.]
(") JAMES E. ZUNTS. [L. S.]
(") C. H. SLOCOMB. [L. S.]
(") J. L. GUBERNATOR. [L. S.]
338 (Signed) C. ROSELIUS. [L. S.]
" HUGH McCLOSKEY. [L. S.]
" C. T. HOWARD. [L. S.]
" W. B. SCHMIDT. [L. S.]
" M. CARVIN. [L. S.]

Signed, sealed, and delivered in the presence of—

(Signed) ALFRED SHAW.
" JOHN S. WALTON.

339 UNITED STATES OF AMERICA,
Circuit Court of the United States,
Fifth Circuit and District of Louisiana:

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 338 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced in the case of Myra Clark Gaines vs. City of New Orleans, subsequent to the filing of the mandate of the United States Supreme Court in said cause, on 28th May, 1869, No. 2695 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court at the city of New Orleans this 1st day of September, A. D. 1871.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

[5-ct. int.-rev. stamp, canceled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 1 day of September, A. D. 1871.

E. H. DURELL, *Judge.*

[5-ct. int.-rev. stamp, canceled.]

340 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Myra Clark Gaines, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a petition & order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein The City of New Orleans is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 17th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

W. B. WOODS,
Judge U. S. Circuit Court for 5th Circuit & Dis't of La.

341 (Endorsed:)
United States circuit court. No. 2695. Myra Clark Gaines vs. City of New Orleans. Citation of appeal.

Marshal's return.

Received, June 17, 1871, by the U. S. marshal, &, on the same day, month, and year served a copy hereof on Myra Clark Gaines by handing the same to her, in person, at the St. Charles Hotel in this city.

S. W. REED,
D'y U. S. Marshal.

JUNE 17, 1871.

On this 8th day of July, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation as stated in his official return hereon.

S. W. REED.

Sworn to & subscribed before me.

F. B. VINOT,
D'y Clk.

(Indorsement on cover:) No. 385. The City of New Orleans, appellant, vs. Myra Clark Gaines. Louisiana C. C. U. S. Filed 17th November, 1871.

REC. 385—8

Supreme Court of the United States.

No. 385.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

MYRA CLARK GAINES, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF LOUISIANA.

MILES TAYLOR,
J. McCONNELL,
Solicitors for City of New Orleans.

Supreme Court of the United States.

No. 385.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

MYRA CLARK GAINES, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF LOUISIANA.

STATEMENT OF THE CASE.

The proceedings in this case were begun by the complainant, Mrs. Myra Clark Gaines, in the Circuit Court of the United States for the District of Louisiana on the 22d day of December, 1856. Its progress was delayed by the unhappy events which broke up and disturbed the peace of the Union from early in 1861 to some time in 1865, and it was decided, on an appeal to this Court, in the spring of 1868. The mandate from the Supreme Court was sent down and filed in the Circuit Court of Louisiana on the 28th of May, 1869, and a decree was rendered in that Court on the 11th of June, 1870.

In the decree, it was adjudged that the complainant, Myra Clark Gaines, was entitled to certain property, together with all yearly rents and profits accruing from the same, "since the same came into the possession of the defendant, the City of New Orleans, to wit: on the 26th of September, 1834, except as hereinafter mentioned, and for which the said defendant was ordered and decreed to account," except as thereinafter set forth in the decree. And it was then stated in the decree, that it appearing by the answer and exhibits, "that the said defendant, the City of New Orleans, had sold and disposed of certain portions" of the said property "before the filing of the bill in this cause, to wit: all of the same, except the following parcels, which were still held and claimed by said City at the time of filing said bill, and at this time; that is to say: all the square comprised between St. Peter street, Hagan Avenue, Orleans street and Lake road, as shown on the sketch annexed to the answer, and on which the draining-machine for draining the City is located; and also four other squares, comprised between Dupré, Salcedo, St. Anne and St. Peter, sold at public auction, as aforesaid, on the 21st day of December, 1820, under the pretended authority of said Richard Relf and Beverly Chew, as testamentary executors of Daniel Clark, deceased, and as attorneys in fact of Mary Clark, and afterwards conveyed by Evariste Blanc to the said defendant, the City of New Orleans, on the 26th of September, 1834;" and it was therefore "ordered, adjudged and decreed, that the said defendant, the City of New Orleans, do forthwith surrender and deliver to

the complainant, Myra Clark Gaines, all of said portion of said tract of land, to wit: The portion thereof bounded and enclosed within Dupré, Salcedo, St. Anne and St. Peter streets, and also the portion thereof bounded by and enclosed within St. Peter street, Hagan Avenue, Orleans street and Lake road, as aforesaid; and that the said defendant do account to the said complainant for the rents and profits of said tract of land so ordered to be surrendered and delivered by it to the said complainant."

And the decree then ordered and adjudged, "that an account be taken by John B. Weller, a Master in Chancery of this Court, of the yearly rents and profits of the said portion of said land now held as aforesaid by the defendant, the City of New Orleans, from the time when the said land came into possession of said defendant, on the 26th day of September, 1834, and of all other portion or portions of said tract of land set forth in the said answer of defendant and exhibits thereto annexed, from the 26th day of September, 1834, to the days and dates when the said defendant, the City of New Orleans, sold and disposed of the same to other parties, and report the same to this Court; said account to be made according to the laws of the State of Loulsiana."—Printed Record, 8, 9.

In the bill of complaint in the cause, filed on the 26th day of December, 1856, the complainant based her right to recover the property in question from the City of New Orleans, the defendant, on a will alleged to have been made by Daniel Clark, deceased, who died in the city of New Orleans in the year 1813,

which was presented for probate to the Second District Court of the City of New Orleans, where Daniel Clark died, on the 18th day of January, 1855, and was recognized as his last will and testament, and ordered to be recorded and executed as such, by a judgment of the Supreme Court of the State of Louisiana, rendered on the 17th day of December, 1855.—Record, Gaines vs. The City of New Orleans et al., S. C. of U. S., No. 345 of the docket.

On the 8th of April, 1871, the complainant, under a writ of assistance, was placed by the marshal in possession of the property so recovered from the City of New Orleans, which consisted of five vacant half squares of ground. (Record, p. 29.) Upon one of the vacant half squares of ground the City had erected and run a draining-machine, at a cost to the City of $151,832.—See testimony of Surveyor Bell, R. p. 27.

The complainant was thus forcibly put in possession of a very valuable draining-machine and buildings, which had been erected by the City upon ground decreed to belong to her.

The Master to whom the reference was made to take an account, in conformity with the decree of the Court, took proceedings under the order of reference; and after "having examined the testimony on file, and from information obtained from the offices of the register of conveyances and assessors of the City of New Orleans, and from information derived from witnesses cognizant of the facts connected" with the business, made a report to the Court on the 14th of March, 1871.—Record, 13 to 29.

In the report the Master states that the portion of ground "bounded by St. Peter, Hagan Avenue, Orleans and Lake Road streets," was acquired by the defendant by purchase from Evariste Blanc, on the 26th of September, 1834; that "the improvements on this property consist of a drainage-house and outbuildings, known as the Orleans draining-machine;" that the property had been in the possession of the City from the date of the purchase; and that "the City received no rents whatever, and no profits, except by the increase of its revenues," etc. (Record, 15.) And then, as the Master, in his report, said he was of opinion that the City having occupied and used the property of Mrs. Gaines for public purposes, obtained in bad faith, for more than thirty-five years, equity demanded that "she should be allowed a fair and just compensation therefor," he examined a number of witnesses, to ascertain the rental value of this property. Six witnesses were examined by him. They estimated the property in question to have a rent value of from $6000 to $10,000 a year. (Record, 14.) But this rent value, as estimated by them, was not based on the value of the rent for the use of the land. It was based, in the first place, on the value of the buildings and machinery erected and placed upon the land by the City at a great expense, for the purpose of using the power of steam to drain the low and swamp lands in the rear of the city, by throwing out the water which covered them in wet weather, by the action of expensive machinery, as will be seen on reference to the evidence of the witnesses examined, filed with the Master's re-

port, and in the second place, the estimated rent value is based upon the supposition that the parties renting the machine, would have the right to ta- the lands drained.—Record, 22, 23, 24, 25.

Louis H. Pilie, the first witness examined, and who said he considered the property to be worth a rent of $5 to $6000 per year (Record, 21,) estimated the property occupied by the buildings and draining machinery —that is, the half square of real estate on which they were placed—to have a value of $2000; while the buildings and machinery cost the City in money, actually expended for them, $50,000, as is expressly stated by him in his testimony, which is embodied in the Report. (Record, 21 and 22.) And it is clear that the other witnesses also made the value of the buildings and machinery, placed on this square by the City, at her own expense, for the purpose of carrying on the work of draining the City, the basis of their estimate of the rent value of the property. Besides, there is the testimony of a number of other witnesses embodied in the Report, who all concur in stating that the square on which the buildings and machines erected for draining purposes are placed, is worth at this time, in its present condition, after being freed from inundation and overflow, by the expenditures made by the City, not more than from $1500 to $2000. (Record, 25, 26, 27, 28. Testimony P. E. Wiltz, Francis Mouney, W. H. Bell.)

The testimony of the witnesses examined by the master further shows: 1st. That all that portion of land in the City of New Orleans, in the neighborhood

where this square is situated, was a swamp. That the City of New Orleans drained and ditched this land, and divided it out into streets and squares, and in many places made banquets or sidewalks. 2d. That the putting up of the draining machine has not injured, but benefitted the square decreed to belong to the complainant. 3d. That all around this draining machine, for many squares, the ground is vacant and unoccupied. 4th. That the City has maintained and run the draining machines, at a considerable annual expense. And 5th. That the city has never, in any way, derived any revenue from its employment, either by imposing a tax or exacting compensation in any shape from the owners of property, for the benefits resulting to property from the operations of the City in carrying on the work of drainage. (Testimony of Wiltz, Mouney, Flanders, Bell. Record, 25, 26, 27, 28.)

The master acting on the case as thus presented, in the report submitted by him to the Court on the 14th of March, 1871, stated his conclusions on the reference to him to be—

Ist. That the complainant was entitled to recover from the defendant, the City of New Orleans, the sum of $499,819.97, or $208,825.00, or $125,266.70, for pecuniary advantages which had resulted to the City from the possession of the square comprised between S. Peter street, Hagan Avenue, Orleans street, and Lake Road. (Record, 14 to 20.)

2d. That the City had not derived any revenue from "the other four blocks embraced in the order of reference"; and that he "could not find any evidence

that the City had derived any revenue from the ballance of the property previous to the sale by the City." (Record, 20, 21.) And,

3d. That as to the question of prescription with respect to the rents and profits, as the Supreme Court of the United States had decided that the City purchased in bad faith, and that the plea of prescription could not be entertained to defeat plaintiff's recovery of the land, so he, the Master, came to the conclusion that it could not be pleaded against the demand for rents and profits. (Record, 21.)

EXCEPTIONS TO MASTER'S REPORT.

To this report the defendant filed exceptions on the 13th day of April, 1871, (Record, 32 to 34,) as erroneous, incorrect, and contrary to equity, and to the order and decree of the Court under which the reference was made; which were in substance as follows:

1st. That by the express terms of the order, the Master was directed to take an account of the yearly rents and profits received by the City from the property in question; that the Master found and so reported that *the City received no rents and profits* from any of the said property in its possession; and yet, upon the hypothesis that the City revenues, derived from lands not in the possession of the City or belonging to it, but the property of third persons, had been augmented by a great increase in the value of such land, which had resulted from its being freed from inundation and overflow, by the working of the machines erected on one of said squares, and kept running to accom-

plish that object, and that the complainant ought to be allowed a fair and just compensation for the occupation and use of the said property, for effecting such drainage, he, the said Master, had reported that in consequence of such supposed augmentation of its revenues, the City of New Orleans ought to pay to the plaintiff, one or the other of three sums of money, for the rent of the square and the buildings and machinery placed upon it, accordingly as one or the other of these conjectural statements of calculations made by him was adopted, which said sums of money were respectively as follows:

By the first, the sum of.....	$499	819 97
By the second "	208,825	00
By the third "	125,266	79

2d. That the land upon which the said buildings and machines were erected by the City for the purpose of effecting this drainage of the rear of the city, was reserved from sale, withdrawn from commerce, and dedicated to public use, to accomplish that very object; that by the laws of the State of Louisiana, the said City was invested with power to expropriate land belonging to private individuals, which was required for public use for such a purpose; that the said City had the right to withdraw said land from commerce and dedicate it to public use for that purpose, while it was claimed, and held and possessed by the said City as owner, with the same effect, both in law and equity, as if it had been expropriated for the same purpose, in due course of legal proceeding, while held and pos-

sessed as owner by the plaintiff, or any other person; and that the plaintiff, as the owner of said land, could, neither in law or equity, be entitled to demand and recover from the city more than the value of the said land at the time it was so set apart and appropriated to the said public use, and in the condition in which it then was.

3d. That the City could not be, in law or equity condemned to account to the plaintiff for rents and profits for a draining machine built by the City with its own materials and means, and run at its own expense exclusively for the public benefit, and placed upon land necessary for the purpose, in the public interest, and which, by such appropriation, is dedicated to the public.

4th. That the buildings and machinery erected on the said square of ground, having been erected on it with the materials and at the expense of the City, were the property of the City; that the plaintiff had no right to keep them, unless she reimbursed to the City the value of the materials and the cost of the workmanship; and that the report of the Master, by implication and illegally, allows the said plaintiff to keep them without paying the price for them fixed by law.

5th. That from the evidence before the Master, it was manifest that when the City came into possession of the lands bought from Evariste Blanc in 1834, they formed part of an uninhabitable swamp, and were of little or no appreciable value; that said lands have not only not been injured by the possession of the City.

but that, on the contrary, all the real value they have at this time has been givea to them by expenditures made by the City in opening streets, and making ditches, and draining and freeing the same from water by the erection of the said buildings and draining machines, and running them for a long series of years at the expense of the City; and that if the City of New Orleans is liable to pay any rent for the said square of ground so occupied, such annual rent cannot in law or equity, exceed a sum which will be equal at the farthest, to the legal interest on the present value of that portion of ground, apart from the buildings and machinery placed on it; and,

6th. That the Master wrongfully disallowed the plea of prescription as a bar to the recovery of rents and profits which might have accrued more than three years anterior to the institution of the suit for the recovery of the property. (Record, 32 to 34.)

RULING OF THE COURT UPON THE EXCEPTIONS.

After a hearing upon the exceptions, the Court observed: "The estimation of the rents and profits in" the case of the City "is so uncertain and speculative, that I do not feel entirely satisfied as to the decision that should be made. The Master evidently felt the same embarrassment. He says: "As the City received no rents whatsoever, and no profits, except by the increase of its revenue, it is difficult to fix the amount to which the complainant is entitled." The Master

presents facts and figures which he trusts will enable the Court to arrive at an equitable conclusion.

The Court then refers to the three different hypothetical calculations submitted by the Master, and adopts the third one, which is stated to be based on "the value of the land and buildings without the draining machine, and giving credit for ordinary repairs to the buildings, independent of the machine." This made the rents $157,600, and the repairs $32,333 21, leaving a balance of $125,267 79. And the Court then observed: "As the Master has not signified his adoption of either of these estimates, but has stated the facts to the Court for its equitable determination, I have come to the conclusion that it would be equitable and just to set off the profits derived by the City from the drainage machine for the past thirty-five years against the cost of construction and repairs, and to charge the City with the rents of the buildings and land, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of $125,267 77. Whilst the profits and advantages of the drainage machine were indefinite and uncertain in amount, there is no doubt as to their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the City for all its expenditures, even the rent with which it is charged.

A decree will be made confirming the Report of the Master in the case of the City of New Orleans, upon the basis of the last alternative stated in the report."

II.

ASSIGNMENT OF THE ERRORS RELIED ON.

1st. The allowance of the sum of $125,267 77 upon the hypothesis adopted, based on the value of the land and buildings without the drainage machine, and giving credit for the ordinary repairs to the buildings, independent of the machine, is excessive, illegal and inequitable.

2d. Any allowance of rents and profits based upon the value of any portion of the buildings or other improvements placed on the square of ground in question, by the City of New Orleans, all of which were made with its own materials and at its own expense, as due and owing by the City of New Orleans to the complainant, under the decree in her favor for the recovery of property vested in her as the instituted heir of Daniel Clark, is illegal and contrary to equity.

3d. The said square of ground having been dedicated to the public use by the City of New Orleans in the year 1836, to accomplish an important and necessary public purpose, and the buildings and machinery placed on the same, having been ever since employed in the accomplishment of that public purpose, there is no right, either in law or equity, to allow to the true owner of the said square of ground at the time it was so dedicated to the public use, anything more for the rents and profits of the same, than legal interest on the value of the square at the time it was so dedicated to the public use in 1836; and the allowance of any sum

exceeding $50 a year is in violation of both law and equity, and is an error.

4th. There is no right or authority in law for the allowance to the plaintiff of any sum or sums of money for rents and profits on the said square of ground from 1836, predicated upon any fact, or the assumption of any fact that the city derived any profits and advantages from taxes levied on the increased or augmented value of other lands, resulting from the operation of the drainage system established, maintained and carried on by the city, at its own expense from 1836, and the allowance of any such rents and profits was, and is on error, and the judgment appealed from ought to be reversed therefor.

5th. The confirmation of the third estimate made by the Master in his report, made by the court by setting off the cost of the construction, and of the repairs made to them by the City on the square of ground in question, against the profits said to have been derived by the City from the drainage machine for the past thirty-five years, has the effect of givng to the plaintiff the buildings and machinery erected on it, with the materials and at the expense of the City, without paying the City for the value of the materials and the cost of the workmanship, or any other price whatever, as required by law, and such confirmation was an error, and ought now to be set aside.

6th. The refusal to admit the plea of prescription in bar to all rents and profits that may have accrued for the use of the said square three years anterior to

the institution of this suit, on the 26th of December, 1856, is contrary to law and is an error.

III.

BRIEF OF ARGUMENT.

1st. Assignment of error.

If it is assumed that an allowance should be made to the plaintiff for rents and profits, based on the value of the land and buildings erected on it by the City, without the draining machine, and giving credit for ordinary repairs to the buildings, independent of the machine, then the allowance of $125,267 77 upon the facts presented in the report, is entirely unauthorized in law.

The amount fixed upon by the Master as the value of the annual rent for the property, with the buildings on it erected by the City, and excluding the draining machine, is $2400. The amount of rent from the first of July, 1836, to the time when the account was taken is stated by the Master at $84,800. Rec. 18 and 19. But the buildings were not erected on the square until 1836. Testimony of L. H. Pilie and W. H. Bell, Rec 22, 27. The sum of $2400 is, therefore, to be deducted, leaving $82,400. To this amount of rent, the Master adds interest calculated on each instalment at the end of each year. Interest on $2400 from the first of July, 1835, to first July, 1836, is put down at the sum of $4120. But there could have been no such rent due for that year, as the buildings, which are supposed to make 18-20ths of the value on which the rent is calcu-

lated, were not put up by the City until a year later, in 1836.

To the total amount of the rent, from the 1st of July, 1835, of $84,800, as made out by the Master in his Report (Record, 18, 19), he has added interest on each year's rent, from the end of each year, which makes an additional sum of $72,800. Such an addition of interest to the amount of the rent is in violation of the statute law of Louisiana as it has existed ever since 1808. In the Code of 1808, p. 270, Art. 53, it was declared that "in obligations confined to the payment of a certain sum, the damages arising from delay in the execution are never adjudged to exceed the interest fixed by law, except where particular rules of commerce and suretyship govern the case. Those damages are due without the conditions being required to prove any loss. They are due only from the day they are demanded, except in cases where the law makes them accrue of right." And in Art. 55, on the same page, it was declared that "income fallen due, such as rent, hire, arrearages of perpetual rents or annuities, bear interest from the day they are demanded or from the day of the agreement. The same rule applies to restitution of fruits," &c. And in the Code of 1825, Art. 1939, it was enacted that "sums which are due for yearly rents, for annuities, either forever or for life, bear interest from the day the debtor was in default, either by the terms of his agreement or otherwise." And that "the same rule applies to sums due for restitution of profits," &c. One was in default, under

the Code, in the absence of any express stipulation on the subject between the parties after a demand made, "either by the commencement of a suit, by a demand in writing, by a protest made by a Notary Public, or by a verbal requisition made in the presence of two witnesses." Code of 1825, Art. 1905, 2; Code of 1808, p. 266, Art. 39. And in the Code of Practice adopted in 1827, Art. 553, it was specially declared, "Interests shall not be allowed by the judgment, unless the same have been expressly claimed, and then, only in cases in which the law permits such interests to be stipulated."

The law as thus established in the Codes, remained unchanged until 1852, when it was enacted that "all debts shall bear interest at the rate of five per cent. from the time they become due, unless otherwise stipulated." Acts of 1852, p. 95. And thus it is at once apparent that the interest charged on the sums of $2400, as due annually from the 1st of July, 1836, to 1852, must be struck out from the account of interest stated by the Master and found on page 19 of the Record. This would diminish the charge $53,730, and leave only $19,070. This sum of $19,070 would then be increased by interest on the sum of $37,800, amount of the rent, which had accrued at the time of the change of the law on the subject of interest, amounting to $25,820, so that the amount of interest to be added to the capital of the rent accrued, upon the hypothesis adopted, would amount to $44,890, instead of $72,800, from which it would be self-evident that the amount of the judgment in favor of the plaintiff, appealed from

in this case, is for $27,910 more than would or could be due to the plaintiff upon the hypothesis suggested by the Master and adopted by the Court, in confirming the Report.

But this is not all. There is a manifest error in the report of the Master as to the credit to be allowed to the City, on the hypothesis adopted, for the cost of the repairs made on the buildings by the City while occupying the ground. The annual cost of the repairs which the Master allowed to the City was five hundred dollars ($500), making a total of $17,166 66. (Rec. 20.) This allowance, the Master stated in his report (Rec. 19), was made "from information derived from both Mr. L. H. Pilié, late City Surveyor, and Mr. John Community," etc. But on referring to the testimony of L. H. Pilié, returned by the Master with his report (Rec. 24), it will be seen that he stated the "annual cost for keeping buildings in repair" to be from $1800 to $2000. And this is all that Mr. Pilié's testimony contains on the subject. And, on referring to the testimony of John Community (Rec. 22), it will be seen that he says nothing whatever on the subject. The difference between the $500 a year allowed by the Master and $1800 a year, allowed by Mr. Pilié as the annual expense, would constitute an error against the City in the amount of credits to which she was entitled, on the basis adopted by the Court, of upwards of $45,000.

2. Assignment of Error.

It is adjudged by the decree in the case (Record, 7

and 8) that the property conveyed to Evariste Blanc on the 30th of October, 1821, and which Evariste Blanc, by act of sale of September 26, 1834, conveyed to the Mayor, Aldermen and inhabitants of the City of New Orleans, was vested in the plaintiff, who, by virtue of the last will and testament of Daniel Clark, was the universal legatee of Clark, and as such entitled to all the estate of which he died possessed, that the City of New Orleans should surrender and deliver to the plaintiff such portions of the land held by it under the sale from Blanc; and that the City should account to the plaintiff for the rents and profits of the same. The right to recover fruits and profits is restricted to the fruits and profits from the land. The buildings and other improvements existing on the land at the institution of the suit made no part of the property left by Daniel Clark. They were placed on the land, at the expense of the City, more than twenty years after the death of Clark; and, under the laws of Louisiana, constitute no part of the property out of which rents and profits are to be accounted for, or upon the value of which a calculation of conjectural benefits and advantages derived from the use of the property recovered can be based.

When one who is not the true owner of the soil makes improvements on it with his own materials, and at his own expense, the improvements are not so incorporated with the soil on which they are placed as to become a part of the estate, and pass to the true owner when he reclaims the land, and the former possessor,

who placed the improvements on it, is evicted. When the right to the ownership of the land has been decided in favor of the true owner, and the illegal possessor is ordered to yield up the possession, the true owner of the land has always been regarded in Louisiana in no other light, with respect to such improvements, than an individual who is authorized in law to become the owner of them, upon certain well defined contingencies.

1. If the person evicted was not sentenced to make restitution of the fruits from the soil, because he was a possessor in good faith, the true owner had the choice, either to reimburse the value of the materials and the price of the workmanship, or to reimburse a sum equal to the enhanced value of the soil. In such a case, the plaintiff was compelled by law to become the purchaser of the improvements. The only right of election given him was one which might enable him to affect the price he should pay.

2. In all other cases, and especially when the possessor who made the improvements with his own materials, and at his own expense, was evicted, and sentenced to make restitution of the fruits yielded from the soil, the true owner is not required or compelled to become the purchaser of the improvements. He has the right to refuse to buy them, and to compel the one evicted to take them away, or to demolish them, and to pay him damages, if the case requires it, for the injury which the true owner has sustained.

But in such a case, if he sees fit to do so, the true

owner has a right to keep them, or in other words, to become the purchaser of the improvements for a price equal to the value of the materials and to the cost of the workmanship—Code of 1808, p. 104, Art. 12; C. C. of 1825, Art. 500.

Until the true owner makes his election, to become the purchaser of the improvements made by a third person on a portion of land recovered by him from that third person by a judicial decree, the improvements made by that third person, in law, make no portion of the land recovered.

They are, in point of fact, the property of the person evicted, and there is no more right in a plaintiff in such a case, to be paid the rents and profits issuing out of that particular property of the defendant, than rents and profits issuing out of any other property belonging to him.

In the case before the Court, the decree, Record, 9, orders that an account be taken "of the yearly rents and profits of the said portion of land," etc.; rents and profits for which a judgment is given against the defendant, eighteen-twentieths are stated in the report of the Master to issue, not out of the land, but out of improvements placed on the land by the defendant, and which, as yet, make no part of the lawful property of the plaintiff. This is erroneous, and we now respectfully submit that the judgment confirming the report ought to be reversed on that ground.

THIRD ASSIGNMENT OF ERROR.

It has been a settled principle in the public law in all civilized countries, that the rights of property must be made subservient to the pablic welfare. To use the language of Kent, 2 Kent's Com. 339, "the right of eminent domain, or inherent sovereign power, it is admitted by all publicists, gives to the Legislature the control of property for public use, etc. What is acted upon as a great principle in most countries is matter of positive law in Louisiana. In article 2604 of the Civil Code of 1825, it is declared that, "the first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses, under the protection of the laws, any particular property, is tacitly subjected to the obligation of yielding it to the community, whenever it becomes necessary for the general use.

The land left by Daniel Clark at his death, and conveyed on the 21st day of December, 1820, as set forth in the decree under which the reference was made, giving rise to the present contestation, and a very large extent of land situated in the rear of the then inhabited parts of the City, consisted of a swamp almost constantly covered with water, and in such a condition as to be unfitted for the purpose of human habitation, or for occupation for carrying on any of the ordinary industries of life. Record, 8, 25, 21, 2 vol. of Record of Gaines vs. City of New Orleans, 297. The freeing these lands from the dominion of water and rendering them susceptible of occupation for the use of man, was es-

sential to the future growth of the City, and to the promotion of the health and future sanitary condition of the then existing population.

The great object of the corporation of the City of New Orleans, in making a purchase of that property from Evariste Blanc in 1834, was to obtain the control of it, so that it could be laid out as a part of the city, into squares, with streets between them, in which ditches could be dug, to ensure the speedy flow of the water on it towards the lowest point in it, so that the water flowing to that point could be thrown out by proper machinery, and the lands be rendered fit for permanent use in the common pursuits of life, by a resident population. Soon after the purchase from Blanc in 1834, the land embraced in his sale to the City was laid out into squares, divided by streets, and all of the land not constituted into streets, or dedicated to the public use, as open places set apart to furnish parks or pleasure grounds, for the comfort and enjoyment of the people, or appropriated to public use as a place for the erection of the buildings and machinery necessary to effect the drainage of all the rear of the city, was at once disposed of by sale, and passed into the hands of third persons, who acquired it in the hope and expectation that the expenditures proposed to be made by the City, with a view to its drainage, would give to the land a constantly increasing value.

The fact must not be lost sight of, that the corporation of the City of New Orleans has, like all other municipal corporations, a two-fold character: 1st. It is

capable of holding property, and of exercising all the rights of ownership with respect to it, like individual persons. 2d. In its municipal character, it is a public agent, charged with the administration of the local affairs of a portion of the territory of the State; and when acting in that capacity, is nothing more or less than a trustee for the public. The City disposed of all the land conveyed by Blanc to it, which was laid out into squares and divided into lots, destined to continue in commerce, as subject to private ownership, many years before the institution of the suit in which this proceeding has been had. When it so disposed of those lands, it ceased to have any connection with them as a private owner. Whatever relation it had to the square in question which was not sold, was in its municipal capacity of a public agent charged with the administration of a portion of the territory of the State.

If the square had been in the possession of any private individual, it would have been subject to expropriation in the ordinary course of proceeding, as provided in the Civil Code of 1825, arts. 2604 to 2611. And in that case, the owner would have been compelled to yield it up, and would have been entitled only to be paid a price equal to the value of the square in the condition in which it was in 1836, before any attempt at draining the lands in the rear of the then city was made. It is true, that no proceeding for the expropriation of this square of ground were then had. But the reason of this is sufficiently

obvious. The City was in possession of it under a sale. It was known that the proprietor of a thing, when it was required for the general use, could yield it up; it was believed that the City in its private character of owner, was both competent and willing so to do; and the City in its municipal character, appropriated the square to the general use, for the purpose of being occupied by the buildings and machinery necessary to carry on the work of draining the lands in the rear of the city; and placed buildiugs and machinery on it in 1836, for accomplishing that work, and has actually carried on the work ever since, at a great expense, as is abundantly shown by the evidence accompanying the report.

Under the circumstances of this case, does it admit of any doubt that the appropriation of the square thus made to the City for the general use, was not as effectual to vest the use of this ground in the public as if it had been formally expropriated in a proceeding against a private individual in 1836, then in possession of it. We cannot think it does admit of any doubt in law, and least of all, in a court of equity, one of the maxims of which, in matters growing up under transactions or agreements between private persons, is, "that equity looks upon that as done which ought to have been done." 1 Story's Equity Jurisprudence, § 64, *g*. It is true, that equity will not thus consider things in favor of all persons. But it will do so in favor of such as had a right to pray that the acts might be done. In the present case, there is a peculiar propriety in giving

effect to the maxim, for it is in evidence before the Court: 1st, that the drainage of these lands was of the greatest importance to the public, in regard both to the increase and extension of the habitable portions of ground in the rear of the then city, and to the improvement of the health of the neighboring population, and to all private individuals having rights in, or claims to the lands which would necessarily be benefitted and greatly augmented in value by the proper drainage operations. 2d. The square of ground involved, was required for the use of the public, in order that the contemplated work might be undertaken and carried on with success. 3d. The right to have it taken from the owner by compulsion, in the ordinary course of a regularly prescribed proceeding was given by the statute law of the State. 4th. Such a proceeding was deemed unnecessary, because the City was believed to be the owner of the property, and the mere fact of its applying the square to such a purpose, if it were the owner, would have been an expropriation of the property and vested it in the public. 5th. If it had been known that the square was the property of the plaintiff, the City was authorized to obtain the expropriation, in its capacity of a municipal corporation, under the general law of the State, embodied in the Code of 1825.

If the plaintiff had then been in possession of the square as the recognized owner, it could and would have been expropriated in 1836, if she had not voluntarily yielded it up for the general use, and the only

compensation that she could have been entitled to by way of price, would have been what it was then worth, "regard being had, not only to the general value of property of the same nature and quality, but to the particular value which it" might have possessed "in relation to the rest of the estate from which it was to be dismembered, etc." C. C. 2608. This value would have been very small indeed, for the Master, in his report, came to the conclusion from the evidence before him, and returned with the report, Record, 18, 22, 25, 28, that its value, excluding the buildings and machinery upon it, at this time, after it has been drained, and freed from inundation, does not exceed $2000. If this is true, it is perfectly obvious that the only amount which the plaintiff can be entitled to recover would be on any known principle of law, a sum for the annual rents and profits of the land so appropriated to the public use in 1836, which would be equal to legal interest on its value at that time. And we are of opinion, that upon no estimate which it is possible to place upon that square, as it existed in 1836, and before any drainage of it, and before any buildings or machinery were erected on it by the City, such ~~unusual~~ annual rents and profits could not have exceeded $50 a year for the time they are payable.

FOURTH ASSIGNMENT OF ERROR.

The land which belonged to Daniel Clark at the time of his death, and which was conveyed to Evariste Blanc in 1820 (record 8; record of S. C. of U. S., Gaines vs.

City of New Orleans, 2 vol. p's 207, 208, 1080, 1081), of which the square in question constitutes a part, contained about 85 superficial arpents; and when it was conveyed to Evariste Blanc it had been offered in the usual manner at public auction to the highest bidder, and on a credit of three, four and five years, and adjudicated to Blanc for the price of $4760. An arpent is about five-sixths of an acre, so that the tract of land then conveyed contained about 122 acres in superfices. This price was undoubtedly a fair one, and amounted only to between $42 and $43 an acre, notwithstanding its situation. In its natural condition the land had no value except for the wood upon it. It could only become of any value after the wood was cut off from it, by being freed from inundation and thoroughly drained. This was done by the use and employment of the buildings and machinery placed on the square of ground, and maintained for accomplishing those objects out of the public funds raised from the people by the city of New Orleans in its character of a municipal government, one of the territorial divisions of the State, and expended by it in the same character, for the general benefit and advantage. The tax payers who furnished the means by payment of the taxes assessed upon their property, to begin and carry on and maintain the system of drainage, were reimbursed in part, some by the increase and extension of business in the city, others again by improvement in the general health of the population, and others again by an augmentation in the value of the property which was freed

from the dominion of water and put in a condition for use by an increasing population, for the purpose of habitation, and for carrying on upon it the common pursuits of life.

Every one who was incidentally benefitted by the drainage of the lands, was entitled to the enjoyment of the benefits which fell to his share, as a consequence of works undertaken and carried on for the general good at the public expense.

And no one will have been benefitted in a greater degree than the plaintiff, by the expenditures of the public funds made by the City of New Orleans, in its character of a municipal government. The land which she recovers was worth $42 or $43 dollars an acre before these expenditures; and if it were in the same condition now, it would be worth but little more. But when she recovers it, it has been freed from inundation and completely drained, through the action of the city in its character of a municipal government, by the expenditure of public funds, and when she takes it into her possession it has, in consequence of those expenditures, become worth from $500 to $1000 an acre.

To this augmented value the plaintiff is entitled as the owner of the soil. But we know of no principle of law which gives courts of justice the right, after she reaps this crop of fruits, produced by the expenditure of the public funds under the administration of the City, a municipal government, to sentence that municipal government, to enrich her still further, by the payment of a large sum of money, on the ground, that

other property, belonging to other persons, had also been augmented in value, and in consequence of that augmentation in its value, they had paid still larger amounts into the public treasury, as their share of the contributions or taxes levied annually on all the property of that territorial division of the State, to defray the public expenses incurred for its local government. In our view, such a judgment is not only without warrant in any principle of law, but in direct opposition to equity, and in violation of every principle of sound policy.

FIFTH ASSIGNMENT OF ERROR.

The Court, in its action with reference to various other defendants in this case, admitted that, under the laws of Louisiana, the persons who are subject to eviction under the decree rendered in it are entitled to compensation for the improvements made by them on the land in their possession, and made provision to enable them to establish and recover the value of such improvements, although they had never set up any such claim in any proceedings in the case. (Rec. 95, 96.) In the special case of the City, the Court, though admitting the right of the City to the value of the improvements made on the square of ground on which the draining-machine was placed, nevertheless confirms the report of the Master, which virtually allows the plaintiff to retain the improvements without paying for them, as required by law. This confirmation was made, however, by the Court on the special ground that "the profits derived by the City from the drain-

ing-machine for the past thirty-five years" (Record, 96), were an equitable set off "against the cost incurred for the construction and repairs of these improvements."

But it is now manifest from what has been heretofore said: 1st. That the plaintiff, under the decree in her favor, is only entitled to the fruits and revenues which might have been produced by the square of ground in its natural condition, and without the addition to it of the buildings and machinery constructed on it by the City with its own materials, and at its own expense. 2d. That the plaintiff has no legal o equitable claim to any rents or profits issuing from the use of those buildings and machinery, because they were, and still are, the property of the City of New Orleans, and not of the plaintiff. 3d. That the plaintiff neither had or could have any right to claim anything from the City for profits derived from the use of the draining-machine, because whatever benefits resulted from the draining operations vested directly in the plaintiff, in her character of owner of a portion of the lands benefited by the drainage, and in the respective owners of the other portions of those lands, and in the public, and not in the City in its private character of a private corporation.

Under such circumstances, it seems sufficiently clear that the confirmation of the third estimate made by the Master in his Report, has the effect of giving to the plaintiff: 1st. The improvements made by the City on

the square in question, which were at the time of the reference, in 1872, of the value of at least fifty or sixty thousand dollars. (Record, 21, 24,) and 2d. The sum of $125,266 79, making a total of upwards of $172,000, for the use of the square of ground recovered in the case which had a value when taken possession of by the City, of not more than one hundred or one hundred and twenty-five dollars, and is now returned to her in kind, so augmented in value by the labors and expenditures of the City, that instead of one hundred or one hundred and twenty-five dollars, it is now worth nearly twenty times that sum.

The mere statement of such a result, would seem to be sufficient to show that it could not be in consonance with either law or equity.

SIXTH ASSIGNMENT OF ERROR.

By the laws of Louisiana there are two kinds of prescription, which have nothing in common with each other, and which operate on entirely different principles. One is the prescription by which property is acquired, the other the prescription by which debts are released. The first prescription is one by which the mere possessor acquires the property of the thing which he possesses, by the continuance of his possession during the time fixed by law. C. C., 3420, 3421, 3435, 3 442, 3445, 3446. "The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without ~~taxing~~ his claim." C. C., 3422. "To enable the debtor to

claim the benefit of this prescription, it is not necessary he should produce any title or hold in good faith; the neglect of the creditor operates the prescription in this case." C. C., 3496.

The Master in his Report, said, that "as the Supreme Court of the United States has decided that the City purchased in bad faith, and that the plea of prescription could not be entertained to defeat the complainants' recovery of the land, so the Master has come to the conclusion that it cannot be pleaded against her demand for rents and profits." The Court, in confirming the Report, did not specially refer to this point, or assign any reason for holding the law of the case to be that the entire rents and profits were to be accounted for.

But the reason given by the Master for arriving at that conclusion has no foundation in principle or law.

The prescription for a less term than thirty years must be based on a just title and good faith to enable the possessor to defeat the claim of the true owner. The only question at issue in the cause, connected with prescription, when the Supreme Court of the United States decided it, was whether the prescription *acquisitive causa* should prevail; and the court decided that it could not, because the city had notice of the defect in the title of its vendor, and was therefore in bad faith, and not protected in the possession and enjoyment of the property under a prescriptive title. This decision did not go beyond the question as to the title of the property. But when an immovable is recovered in a

petitory action, the one who is evicted is bound to return the fruits, gathered from it by him, to the owner. But this obligation constitutes him the debtor of the one evicting him (C. C. 494; old Code, 102, art. 6), and under it, in all cases, the plaintiff is entitled to a judgment for the fruits received during the pendency of the suit in which the recovery is had. If the party evicted was in good faith, the plaintiff could recover a judgment for the return of no fruits gathered by the possessor before the institution of the suit in which the recovery was had. If, however, the possessor was declared to have been in bad faith, then the plaintiff would be entitled to a judgment for the return of fruits received before the institution of the suit.

But in all cases of this kind the plaintiff is liable to be cut off from the recovery of fruits which had been received more than three years prior to the institution of the suit, because, 1st, the obligation to return the fruits and revenues gathered and received by the one evicted, constitutes a debt for ~~trust~~ or hire of immovables. (Code of 1808, 270, art. 55; C. C. art. 1939.) 2d, The one who owes this debt, falling due annually, is released from the obligation to pay it by prescription, by the lapse of three years and of ten years, after it fell due, without any suit brought tending to recover it, in consequence of the mere silence of the creditor for three years after it fell due. (C. C. 3503, 3508, 3494, 3495.) And, 3d, It is not necessary "to produce any title, or to hold in good faith," to enable the debtor to claim the benefit of this prescription, as

is declared in section 3496 of the Civil Code, before quoted.

But, in point of fact, and so far as it relates to all questions connected with the return of fruits and revenues derived from the property which was the subject of this suit; and was purchased and taken possession of by Evariste Blanc, on the 21st day of December, 1821, and was sold to him by the City on the 26th of September, 1834, all the defendants in the case who were in possession of any portions of the property when the decree was given in it, were in law, just possessors up to the date of the rendition of the decree. The Code of 1808, p. 478, Art. 23, declared that "the natural connection which is between the possessor and the property, makes the law to presume that they are joined in the person of the possessor, until it be proved that the possessor is not the right owner, the law will leave him, by the bare effect of his possession, to be considered as such.

And, *it suffices of a year's possession, even in the person of an usurper, if it has been peaceable and uninterrupted, to make him to be considered as a just possessor, and even as a Master, until the true owner makes out his right.*"

In the present case, the defendants and those under whom they held, went into possession of the land claimed in the suit by the plaintiff, as early as the 30th October, 1821, Code of 1808, 350, Art. 29; C. C. 2455. Their possession of it was then peaceable and uninterrupted from that time up to 1836, as leased, when the first suit of plaintiff claiming the land as her property,

was instituted. Under the law of Louisiana, as it stood when these parties entered into possession of the land in question, and up to 1825, when the Civil Code of 1825 was adopted, after the lapse of one year from the time their possession commenced, they were to be held and regarded as just possessors, until the true owner made out her title. And the change made in the law on this subject, by the Code of 1825, had no effect on the rights of the defendants, as fixed under the Code of 1808—Donaldson vs. Winter, 8 N. S. 181, 182.

If the obligation imposed by law upon the possesor of property belonging to another, to return to the true owner the fruits and revenues which he may have gathered or received from it, constitutes a debt, it would seem impossible, on principle, that such debts should not be subject, in all cases. to the operation of the law of Louisiana releasing debts, when the creditor has been silent for a certain time without seeking to enforce his claim. Statutes of limitation are wise and beneficial exercises of the legislative power. Those in force in Louisiana, from the origin of its government, have their foundations in a wise and enlightened public policy, and in entire consonance with the principles of equity.

When property involved in litigation is recovered after a judicial contest, it sometimes happens that a long period of time has elapsed since the true owner was first divested of his property, and that the revenues derived from it during that period amounted to

greatly more than the value of the property. In such cases, in England, under the operation of the rules of common law, it was not of unfrequent occurence that the recoveries of mesne profits were for such large amounts as to entail the most absolute ruin on the person who was condemned to pay it; and that, too, under circumstances which were repugnant to all popular notions of what was just and right in itself, and to shock the moral sense of the public. If we have not been misinformed, this evil rose to such a height in that country that there was legislative interference, and the right to the recovery of mesne profits was restricted to the six years immediately anterior to the commencement of proceedings in ejectment.

In this State, however, the provisions of the civil law, which have always been in operation in it, are such that no such consequences could ever follow. The obligation to return the fruits and revenues gathered and received, which is imposed by the law on the one evicted, constitutes the amount of the fruits and revenues of each year *a debt* due from the one in possession to the true owner, and subjects that debt to a peremptory and perpetual bar after the lapse of three and ten years from the time when the debts severally accrued, if the creditor remains silent without urging his claim. In the present case the plaintiff instituted her action on her claim to this land which has been recognized by the decree only on the 22d of December,

1856, so that under no circumstances can she be entitled to recover anything for fruits and revenues, or rents and profits, which accrued to the City prior to the 22d day of December, 1853.

All which is respectfully submitted,

MILES TAYLOR,
J. McCONNELL,
Solicitors for City of New Orleans.